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The Multi-Door Contract and Other Possibilities

THOMAS J. STIPANOWICH*

Twenty years ago Frank Sander unveiled the concept of a “multi-door courthouse” in which disputes would be allocated to various dispute resolution mechanisms—court adjudication, arbitration, mediation, negotiation and other processes—on the basis of rational criteria such as the nature of the dispute, the relationship between disputing parties, the amount in dispute and concerns regarding the speed and cost of dispute resolution.¹

*The author is William L. Matthews Professor of Law at the University of Kentucky. He is co-author, with Ian R. Macneil and Richard E. Speidel, of *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT* (1994). He is currently Academic Reporter for the Protocol for Arbitration and Mediation of Consumer Disputes, Academic Advisor to the National Conference of Commissioners on Uniform State Laws Drafting Committee for Reform of the Uniform Arbitration Act, Director of the National Commission on the Future of Arbitration of the CPR Institute for Dispute Resolution, and a member of several national policymaking bodies and advisory groups for construction and securities arbitration. The author wishes to thank law students Matthew Gillies (Class of 1999), Jason Jasper (Class of 1998) and Deborah Murphey (Class of 1997) for their research assistance in the preparation of this Article. A special debt is owed to Elizabeth Plapinger of the CPR Institute for her critical insights.

¹ See generally Frank E.A. Sander, *Varieties of Dispute Processing, The Pound Conference*, 70 F.R.D. 111 (1976). Professor Sander's vision, and trends in court-connected conflict resolution approaches generally, have provoked a variety of positive and negative responses. See, e.g., Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TULANE L. REV. 1 (1987); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1990) (presenting a range of viewpoints on “pluralist” court-connected ADR and questioning its appropriateness and feasibility); Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute*

He envisaged a dynamic system premised on a flexible tailoring of the process to the controversy aimed at better resolutions of existing disputes as well as grievances that were not then being aired for lack of an appropriate mechanism.

Ideology, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) (recognizing that ADR is a reality; raising a number of specific issues implicated by current trends); Edward Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 S.M.U. L. REV. 2079 (1993); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) (encouraging a "refined" version of Sander's vision); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241 (1996) (considering pros and cons of increasing emphasis on channeling disputes into "alternative dispute resolution").

It is not my intent, however, to critique extensively Sander's original vision or current evocations of that approach, but rather to suggest some parallels between theory and practice in the judicial arena and developments and opportunities in the realm of private agreement. In so doing, of course, I find company with others who have expounded a "pluralist" view of conflict resolution. See, e.g., STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION* 7-13 (1985). I then build upon the conceptual work of Ian Macneil, Stewart Macaulay and other "relational" theorists. See *infra* text accompanying notes 76-92.

Because my emphasis is on transactional settings which tend to bear the earmarks of classical bargains, a number of evolving issues respecting dispute resolution mechanisms in standardized adhesion contracts are addressed only fleetingly. See *infra* note 185. That said, the special concerns of consumers and other "outsiders" drawn into arbitration by standard boilerplate may require different treatment. See generally Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997) [hereinafter *Punitive Damages*] (discussing various implications of widespread use of arbitration in consumer contracts, with special emphasis on recent developments affecting the availability of punitive damages in securities industry arbitration); see also Protocol for Arbitration and Mediation of Consumer Disputes (forthcoming 1998) (on file with author) (due process protocol for conflict resolution processes affecting consumer transactions).

A final caveat: This writing is the product not only of the usual filtering of the thoughts of other academics and practitioners, but also of the reflections upon my own empirical research and, for better or worse, my experience as a neutral in the public (special master, court-appointed mediator and early neutral evaluator) and private (arbitrator, mediator and facilitator) sector, as well as a participant in the establishment of a court-connected mediation program and, more recently, in alternative dispute resolution (ADR) rulemaking in the private sector. It partakes of the advantages as well as the disadvantages of a personal perspective.

In the intervening decades a good deal of progress has been made toward realizing Sander's vision in the public realm. That the realization has fallen well short of his ambitious scheme is not surprising in light of political, practical and economic realities. The typical court-connected "alternative dispute resolution"² program usually hinges primarily on a single mechanism such as mediation or nonbinding arbitration, its size and shape a reflection of state and local funding priorities, the received wisdom of its sponsors and the personal predilections of influential members of the bench and bar. A most significant limitation, of course, is that in the context of public adjudication such processes have to be "retrofitted" into the narrowly tailored schema of litigation—truly "alternatives" in the procedural sense.

One might suppose that the realm of private contract, in which parties have relative freedom to plan for conflict, would be a more fertile field for the fulfillment of Sander's vision. Indeed, around the time Sander announced his pluralistic vision for the courts, scholars were expounding the essential principles of "relational contracts" and the mechanisms by which parties plan for flexibility in long-term contractual arrangements.³ While the broader legal framework provides some assistance in assuring enforcement of provisions and filling gaps, effective governance of the relationship demands a structure which reflects the specific character and context of the transaction. Before Professor Sander unveiled the multi-door courthouse concept, Ian Macneil reflected upon the advantages of various

² ADR is convenient shorthand for a spectrum of approaches in which third parties intervene in various ways in the conflict resolution process. It ranges from binding adjudicatory processes such as consensual arbitration to court-connected arbitration (in which the decision of the arbitrators is typically nonbinding) to other processes in which disputants are exposed to third-party evaluations (early neutral evaluation, minitrial) to mediated negotiation. For more extensive definitions, see Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 75 (arbitration), 84 (mediation), 86 (minitrial), 87 (summary jury trial, nonbinding arbitration) (1997) [hereinafter Stipanowich, *Beyond Arbitration*]. In the realm of court-annexed ADR, it is common to include judicial settlement programs. See Resnik, *supra* note 1, at 221–222.

³ See *infra* text accompanying notes 76–92. In his *Primer of Contract Planning*, Professor Macneil acknowledged that insights might be found "not only in the many academic overviews of contract, but also often in the nooks and crannies of more directly practical works on particular kinds of contracts." Ian R. Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 631–632 (1975) [hereinafter Macneil, *Primer*]. My own exploration of developments in the construction arena relies heavily on such sources. See Parts II–VI.

forms of third-party intervention under long-term contracts, including involved third-party determination of performance through binding arbitration—a mechanism used for adjudicating existing rights as well as filling gaps in performance planning.⁴ He observed that this and other forms of explicit planning were necessary to permit parties to a relational contract “to continue in the face of serious conflict or even in the face of some kinds of minor conflict.”⁵ Provisions for meeting together to discuss problems, for mediation in the event of a dispute and for arbitration were illustrative of approaches useful in maintaining relationships.

Ironically, significant innovation in developing governance mechanisms for consensual relationships has been a long time coming. Despite the freedom to choose among an expanding array of processes aimed at resolving conflict short of adjudication, contract drafters tended to adhere to established discrete processes (particularly binding arbitration), attempting to maximize the utility of those processes by enhancing their flexibility.

Part of the problem was a lack of awareness of choices and a concomitant adherence to existing conflict resolution approaches, especially among transactional lawyers.⁶ Another, greater obstacle to change was the practice of designing processes *ab initio*—at the time of contracting and prior to the emergence of contract-related claims or controversies.⁷ The result in most cases was a forced adherence to relatively static conflict resolution provisions incorporating a single procedure—to wit, an agreement to arbitrate disputes arising under or relating to the contract. A third factor was the wide disparity in perspectives among industry actors and their legal advisors.⁸

Now, however, the pressure of recent legislative, judicial and administrative developments and increasing awareness of the possibilities of other alternatives is encouraging unprecedented experimentation in the consensual arena. As public fora have experimented with a range of solutions to more effectively address the many and varied controversies presented to them, litigators have been exposed to the possibilities of

⁴ See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 867 (1978) [hereinafter Macneil, *Adjustment*].

⁵ *Id.* at 877.

⁶ See *infra* Section II.B.2.

⁷ See *infra* Section II.B.3.

⁸ See *infra* Section II.B.4.

purposive third-party intervention prior to adjudication.⁹ At the same time, nonlawyers have recoiled from the perceived high costs of "Total Process" in the litigation mode and have become more proactive in their approaches to conflict.¹⁰ Gradually, both these trends are feeding, together and separately, into the process of contract planning with results which may ultimately far transcend the capabilities of court settings.

The time is ripe to take stock of current developments in the arena of private contract and assess the possibilities of movement beyond the stock and static approaches of the past. Our model is the "relational" world of construction contracting in which multiple parties are wedded for an extended time to produce a one-of-a-kind product under a potentially wide range of economic and climatic conditions.¹¹ In this world, conflict is not only likely, but well-nigh inevitable. These realities, which have long conditioned parties to the use of out-of-court approaches to conflict, have now stimulated a veritable reformation in contract planning and conflict resolution. The active players are not only attorneys, but nonlawyers who see themselves as rivals of the legal community and remediators of its impact.¹²

As in the public sphere, the result has been a reexamination of the adjudicative model—most tellingly illustrated by recent reforms of the American Arbitration Association's (AAA) construction arbitration program¹³—and, increasingly, the retrofitting of various third-party interventions, such as mediation and nonbinding evaluation, into existing adjudicatory schema for the purpose of deliberately emphasizing and facilitating interest-based negotiation or to clarify "rights boundar[ies] within which a negotiated resolution can be sought."¹⁴ A striking example of the latter is the recent advent of mediation in the ubiquitous American Institute of Architects contract document system.¹⁵ In some cases, systemic

⁹ See *infra* Sections I.B.3, I.C., II.B.1.

¹⁰ See *infra* Section IV.B., Part V.

¹¹ This habitually overlooked realm of contracting is treated at length in Thomas J. Stipanowich, *Rebuilding Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. ____ (forthcoming) [hereinafter Stipanowich, *Rebuilding Construction Law*].

¹² See *infra* Section IV.B, Part V.

¹³ See *infra* Section III.C.

¹⁴ WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 16 (1988). See *infra* Section IV.

¹⁵ See *infra* Section IV.D.

planning moves even further upstream, attacking the roots of conflict and reinforcing the values of solidarity and reciprocity which animate the relationships among contracting partners.¹⁶ Probings beyond project “partnering” include experiments with facilitated problem solving transcending discrete contracts and new forms of integration which will present novel challenges—and opportunities—for industry actors and the lawyers who represent them.¹⁷ Nearer the cutting edge of experimentation, however, are systemic approaches which consider the specific interests and goals of the parties, the range of conflict which is likely to emerge and the relative cost and benefit of process choices within a particular transactional setting.¹⁸

I. THE MULTI-DOOR COURTHOUSE: VISION MEETS REALITY

A. *Dynamic Vision*

In his seminal 1976 concept paper *Varieties of Dispute Processing*, Frank Sander laid down the rough outlines of a proposal for making the public justice system more responsive to the different kinds of conflict which make their way to the courthouse.¹⁹ Sander spoke of the need for “a flexible mechanism that serves to sort out the large general question from the repetitive application of settled principle.”²⁰ By way of illustration, he offered the example of a Swedish Public Complaint Board which performed multiple functions, including mediation, nonbinding evaluation, adjudication of small claims and identification of issues appropriate for legislative or regulatory treatment, in the course of processing consumer grievances. Sander envisioned that the traditional courthouse might be supplanted by a public Dispute Resolution Center in which each grievant would be channeled by a screening clerk into any of a number of processes (such as mediation, fact-finding, arbitration, malpractice screening, court adjudication or an ombud) or a sequence of processes.²¹ Disposition would

¹⁶ See *infra* Section V.

¹⁷ See *infra* Section V.C.

¹⁸ See *infra* Section VI.

¹⁹ See generally Sander, *supra* note 1.

²⁰ *Id.* at 119.

²¹ See *id.* at 130–132. Although Sander did not use the phrase “multi-door courthouse,” the label caught on. See Resnik, *supra* note 1, at 216 n.19.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

hinge on a variety of factors including the nature of the dispute, the relationship between the disputants, the amount in dispute and concerns regarding the cost and speed of conflict resolution.

Sander's multi-door courthouse concept incorporated three basic notions: first, a choice among discrete approaches to conflict resolution; second, a mechanism for channeling disputes into specific processes; and third, sufficient information about a given dispute to facilitate a rational pairing of problem and process.²² In other words, he envisioned a synthesis

²² Recent developments suggest widespread acceptance of the notion that it is possible to find a suitable match between dispute and ADR process. In fact, some courts utilized the Civil Justice Reform Act "pilot period" as an opportunity to explore suitability screening approaches. *See, e.g.*, Civil Justice Expense and Delay Reduction Plan for the Northern District of California 10 (Dec. 1991).

On the other hand, some thoughtful commentators have questioned whether it is possible or beneficial to attempt to match problem and process, at least in the court setting. *See* Bush, *supra* note 1, at 7 n.30 (questioning the "feasibility and appropriateness" of screening and matching different types of cases to different ADR processes in the court setting). *See also generally* John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499 (1989) (arguing that the many differences among ADR programs make objective description and transference of lessons from experience). I agree that there are a number of barriers to the development of successful screening mechanisms and that court programs (and private plans) have had, to say the least, mixed success in developing such approaches. Moreover, personal and professional perspectives make a great difference in defining problems and solutions in conflict resolution, a point that is made repeatedly in this Article. *See infra* Section II.B.4.

Having accepted the fundamental value of some alternative "doors," however, I believe that certain factors enhance the ability to make good choices. The first is a sophisticated adviser with relatively broad experience with different approaches to conflict. (Thus, I argue, the "process expert" such as an experienced magistrate judge is a far better screener than the clerk described in Sander's original concept. *See infra* Section I.C.3.) Second, choice is enhanced by the narrowness of a program's focus and the depth of experience within that limited purview. (A planner charged with establishing a framework for the universe of conflict within a county court may have a far more difficult task than one addressing construction disputes, particularly within the context of a single contractual relationship.) *Cf.* URY ET AL., *supra* note 14, at 20-40 (discussing process by which an ADR systems designer "diagnoses" a limited arena of conflict). A third factor is the ability to gain relevant input from all affected parties—that is, present or prospective disputants. *See id.* at 69-74. A final factor is the ability to address the specific circumstances of a particular dispute after it has arisen. (In this case, ironically, court "screeners" have a leg up on contract planners, who generally establish a framework for conflict resolution at the beginning of the relationship, prior to the emergence of conflict.) *See infra* Section II.B.3.

of various conflict resolution approaches encompassing the broad spectrum of interest-based and rights-based processes, a close tailoring (if not a custom fit) of the method to the matter, and, finally, a dynamic system which responds to the contemporary realities of relationships and other specific circumstances surrounding discrete disputes.

In the two decades since Sander's proposal was aired much has changed.²³ The judiciary has gradually come to acknowledge the value of programmed third-party intervention in conflict. While judicial approbation varies from wholehearted embracement to grudging acceptance, the growth of federal and state court-connected programs centered upon mediated negotiation, nonbinding arbitration and other interventions is truly remarkable.²⁴

²³ See, e.g., Resnik, *supra* note 1, at 229-236 (summarizing revisions to Federal Rule of Civil Procedure 16, the Civil Justice Reform Act and other developments in federal courts). Chief Justice Rehnquist spoke of traditional court models giving way to "comprehensive justice centers, offering consumers a whole menu of dispute resolution procedures." Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. REV. 1, 8-9.

From the vantage point of twenty years of developments in court-connected ADR, one commentator describes aspects of Sander's vision as "almost quaint." Stempel, *supra* note 1, at 327.

²⁴ See generally NATIONAL CENTER FOR STATE COURTS AND STATE JUSTICE INSTITUTE, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (Susan Keilitz, ed. 1994) [hereinafter NATIONAL SYMPOSIUM] (summarizing research findings on the use of various ADR processes in state and federal courts). For an extensive treatment of ADR programs in the federal court system, see ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS (1996); see also ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN (CPR Institute for Dispute Resolution 1992) [hereinafter COURT ADR].

Settlement-oriented approaches in the court setting include settlement conferences, summary jury trials, various forms of mediation, early neutral evaluation, and arbitration, and special masters. For an extensive listing see AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES Annotated Table of Contents (Philip Harter ed., 1991). A more extensive but accessible summary of alternatives is provided in COURT ADR, *supra*, Appendix A.

The value of court-connected ADR remains a subject of intense discussion. A recent report by the RAND Corporation regarding the impact of pilot projects in federal district courts under the Civil Justice Reform Act of 1990 (CIRA) renewed debate over its relative costs and benefits. See generally JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) (summarizing three reports produced under the auspices of

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

Among these programs are notable schemes embodying the multi-door courthouse along the lines envisioned by Sander.²⁵ Such programs are remarkable, however, mainly because of their very uniqueness. Most court-connected ADR programs do not incorporate a smorgasbord of approaches,

the RAND Institute for Civil Justice). The Rand Report, which examined six ADR programs established under the CJRA and found little positive impact on the cost or timing of conflict resolution, ignited a minor firestorm of criticism. *See, e.g.*, Pamela Chapman Enslen, *Insights on Participant Satisfaction May Be Real Significance of RAND Report*, DISP. RESOL. MAG., Summer 1997, at 14; Statement of Concerns Regarding the RAND ADR Study, Issued by the CPR Judicial Project Advisory Council of the CPR Institute for Dispute Resolution and Other ADR Experts (1997); *see also* Craig A. McEwen & Elizabeth Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, DISP. RESOL. MAG., Summer 1997, at 10 (examining RAND Report for lessons for future ADR research). A concurrent study of several other federal court programs by the Federal found evidence of cost and time savings. *See* DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Federal Judicial Center 1997); *see also* Elizabeth Plapinger, *Twilight of CJRA Means Unsure Future for ADR*, NAT'L L.J., Sept. 22, 1997, at B23 [hereinafter Plapinger, *Twilight*].

Although our recent experience with empirical research regarding court ADR emphasizes the danger of over-generalizing, there is some evidence that court ADR is usually a relatively positive experience for representatives of leading corporations and members of large law firms—a group whose perceptions are probably not dissimilar to the body of construction industry practitioners. Recently, the CPR Judicial Project conducted a fax poll of 200 corporate and law firm counsel regarding their experiences with court ADR. *See Court ADR: How Much Do Lawyers Use It?*, 13 ALTERNATIVES TO HIGH COST LITIG. 36, 36 (1995). The 100 responses (from 63 law firm practitioners and 37 corporate counsel) indicated that 83 lawyers had participated in court ADR (mediation, early neutral evaluation, arbitration, summary jury trial, magistrate settlement programs and case valuation) in the past two years. Nearly 75% of respondents said that such programs produced “speedier resolutions” and two-thirds indicated that the resolutions were “more economical.” *See id.* Results were deemed “more satisfactory” and also “better than experiences with traditional court procedures” about 58% of the time and “as good as” traditional court procedures another 30% of the time. *See id.*

²⁵ Multi-door programs have been established in several federal district courts and state courts in New Jersey, Texas, Massachusetts and the District of Columbia. *See* PLAPINGER & STIENSTRA, *supra* note 24, at 67; *see also generally* Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577 (1988) (discussing development of multi-door program in the District of Columbia). *See infra* Section I.C.2.

but reflect more selective use of settlement-oriented third party interventions. There are several reasons for this state of affairs.

B. Realities of Court-Connected ADR

1. Selling the Concept

Most court-connected programs first arose through the initiative of relatively few individuals, including influential members of the bench and bar.²⁶ They were made aware of programs operating in other jurisdictions and came to the effort with those models in mind. From such sources came rules and procedures, forms, administrative guidelines and, most importantly, anecdotal evidence from the field—in other words, all of the building blocks for the establishment and operation of a program.²⁷

There was also the matter of educating prospective users—a critical component of successful implementation. Although the ultimate impact of

²⁶ See, e.g., Kessler & Finkelstein, *supra* note 25, at 587 (noting importance of active involvement of judges in ADR reform). Sharon Press recently related the important role of the Florida Supreme Court and the Office of the State Courts Administrator in the evolution of Florida's groundbreaking statewide ADR program, which is effectively a mediation-based program. See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 905-906 (1997). Florida's pioneering effort provided inspiration for a number of other programs, including the state-supported model mediation program established in my own state. The latter was made a reality with the strong support of an influential judge on our local circuit court and the Chief Justice of the Kentucky Supreme Court. See generally Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855 (1993).

²⁷ Increasingly, such efforts will be aided by data from the field and affected (for better or worse) by the rapidly growing experience of the trial bar with alternative conflict resolution approaches in the full range of public and private venues. The National Center for State Courts, the National Institute for Dispute Resolution, and the CPR Judicial Project, among other organizations, spearheaded educational initiatives aimed at federal and state court judges. See, e.g., COURT ADR, *supra* note 24; NATIONAL SYMPOSIUM, *supra* note 24; see also HANDBOOK FOR JUDGES, *supra* note 24; D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (Federal Judicial Center 1986).

In the federal system, of course, widespread experimentation with ADR has occurred pursuant to the mandate of the Civil Justice Reform Act. See COURT ADR, *supra* note 24, at ix. In addition, a growing number of states have enacted statewide ADR legislation or have establish state ADR commissions or task forces for planning purposes. See *id.* at x n.A6.

the process would be on those whose disputes make their way into the court system, it is not they but the bench and bar—the gatekeepers of the temple of justice—who would ultimately pass upon procedural reform.²⁸ The first hurdle for any procedural innovation is to address the concerns of a critical mass of sponsors and users (which in a program of court-mandated intervention may initially be no more than one or two key judges) and persuade them of the desirability of the change. The idea must initially be explained and sold to those responsible for bringing the program into being and ensuring its proper funding—members of the judiciary or court administrators. Equally important are those expected to channel disputes into the process—judges who will mandate referral and practitioners who will counsel resort to the process.

Inevitably, the response of bench and bar was conditioned by their prior experience in the existing system and their expectations regarding the probable impact of innovation on their caseload or practice. The concerns of attorneys might be expressed as lofty sentiments regarding impositions on the right to trial, or more pragmatic (if misguided) complaints about loss of fees or of forfeiting control of the client or the negotiation process. Judges tend to think in terms of the impact on the docket or on the court's bottom line.²⁹ Would-be reformers who could speak clearly and with authority (that is, from the perspective of a legal professional) to such issues had the greatest chance of success. Best, therefore, to have a proposal which was simple, straightforward and not overly threatening to the status quo, with the help of testimonials from those connected with programs of the kind to be emulated.³⁰

2. Administrative Costs

Selling judges and practitioners on the concept of a third-party intervention was merely part of the problem. With any programmatic

²⁸ I take issue with colleagues who insist that our profession functions merely as the instrument of the popular marketplace. See Stempel, *supra* note 1, at 355–356 (noting the often overlooked role of lawyers in the success or failure of judicial reforms).

²⁹ See, e.g., Raymond Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 222–223 (1989) (evaluating court-connected arbitration in light of cost and time savings).

³⁰ Such realities help to explain why the great majority of court-appointed neutrals are attorneys. See PLAPINGER & STIENSTRA, *supra* note 24, at 9.

change came a myriad of administrative issues, all of which depended upon the scope and function of the program and what support personnel would be required to assist the court in running it. These considerations begat a host of questions: How would disputes be channeled into the program? What would be the source of neutrals? How, if at all, would they be selected and trained? Should neutrals be evaluated or subjected to continuing education requirements? Who would schedule sessions, arrange for the requisite location, handle payment, address the inevitable contingencies and oversee the accompanying paperwork? What of maintaining accounts, case files, neutral files and program statistics and arranging for insurance for neutrals? Of preparing and revising form letters, policies and procedures and creating ethical rules for neutrals? A seemingly endless progression of tasks surrounds even a relatively simple program. Internal responses to administrative needs can cost a good deal of money, particularly if supporting personnel are expected to play more than a strictly ministerial role. The cost of an administrator with a broad range of knowledge and experience in multiple conflict resolution techniques might be comparable to hiring another judge. The leaner and meaner the program, and the fewer the financial and administrative strings, the greater its probable acceptability.³¹

For all of these reasons, it is not surprising that relatively few existing programs aspire to the full synthesis of approaches proposed by Sander.³²

³¹ This is especially so in rural jurisdictions, although it is by no means confined to such environs. Not surprisingly, most multi-door programs are located in large metropolitan areas with a large, variegated volume of disputes justifying the economic and human investment in a commensurately variegated program. See, e.g., Kessler & Finkelstein, *supra* note 25 (discussing D.C. program).

³² See James Podgers, *Maine Route: Multi-door proposal reflects growing role of ADR*, A.B.A. J., Sept. 1993, at 118 (although the multi-door model was considered by 35 states, relatively few have actually implemented programs along those lines). The limited focus observed in most court-connected ADR programs is also observable in related scholarship. See Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 726 (1974) [hereinafter Macneil, *Many Futures*]. While the tendency of scholars and other writers to aim research at a particular conflict resolution mechanism in a particular setting is eminently justifiable, the relative lack of comparative studies and syntheses probably reinforces the tendency to examine the potentialities of individual mechanisms and inhibits the conceptualization of broader visions for public or private conflict resolution. A straightforward comparison of various processes is set forth in Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

The same realities help to explain the predominance of mediation in court-connected programs.

3. *Predominance of Mediation*

Among ADR processes involving the intervention of third-party neutrals, mediation is far and away the most popular choice.³³ This should be no surprise for a variety of reasons. Mediation is a uniquely flexible form of intervention which permits facilitated exploration of disputants' interests (and, in some applications, a consideration of rights and power issues), is perceived as less of an imposition on the trial lawyer and, at first blush, the simplest and easiest to administer of programs of third-party intervention.³⁴

The allure of mediation is in the wondrous simplicity of the idea of third persons stepping into a dispute for the purpose of helping frame issues, find a framework for communication and resolve conflict. In concept a far cry from the adjudicative role, the mediative function is nevertheless something judges understand well because they have been doing it behind closed doors for years.³⁵

³³ See PLAPINGER & STIENSTRA, *supra* note 24, at 4 (discussing predominance of mediation in federal district court programs); see also generally Janice Fleischer, SPIDR Court Sector, Court-connected Mediation Activities, Annual SPIDR Conference (Oct. 1994) (state-by-state survey of court-connected programs) (unpublished report, on file with the International SPIDR Office).

³⁴ On closer examination, of course, it becomes clear that the conceptual simplicity of mediated negotiation masks a host of political and practical questions which a sponsoring institution must address. See *infra* p. 13 and text accompanying notes 38-40. Much of the research on court-connected mediation is summarized in NATIONAL SYMPOSIUM, *supra* note 24, at 5-12, 55-89, 113-139.

³⁵ See generally PROVINCE, *supra* note 27, at ch. III (discussing the role of trial judges in settlement negotiations); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing judicial strong-arming tactics aimed at forcing settlement). And now, of course, they have been assured by amendments to Federal Rule 16 that they have a specific role to play in settling cases. See David I. Levine, *Wayne D. Brazil, Effective Approaches to Settlement: A Handbook for Lawyers and Judges*, 4 OHIO ST. J. ON DISP. RESOL. 123, 123 (1988) (book review).

By "outsourcing" mediation, of course, they substantially transform its character—for the better, most would agree, at least from the standpoint of preserving the integrity of the respective mediative and judicial functions. See Resnik, *supra* note 1, at 248 n.146 (noting commentators' "concern that employing judges to conduct ADR, may prompt coercive behavior in their pursuit of settlement"); cf. Stempel, *supra* note 1, at

As ADR reforms go, moreover, mediation is among the mildest of threats to the status quo. There is usually only the obligation to sit down with a neutral third party to discuss the issues and explore settlement opportunities—no requirement of a formal case presentation involving a revelation of trial strategies or other information and no condition that the neutral address the merits, at least in the company of all parties.³⁶

The dichotomy of mediation is that the very simplicity of the concept obscures the considerable range of intervention associated with the label. Mediation is an enormously flexible approach which is uniquely “tailorable” to a wide variety of conflict scenarios. If, as is often explained, mediation defines a range of activities aimed at facilitating discussion and problem solving consonant with party interests, the term is also popularly associated with approaches in which a third party employs evaluative

342 (favorably comparing ADR to other mechanisms judges use to procure settlement of cases).

³⁶ The latter concerns have factored in judicial decisions limiting the ability of courts to mandate participation in summary jury trial. *See In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993); *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988); *see also* NATIONAL SYMPOSIUM, *supra* note 24, at 38 (summarizing constitutional and practical concerns regarding court-annexed arbitration).

Although questions are sometimes raised regarding the ability of courts to order parties to mediate, the question remains relatively uncontroversial among courts. *See Press*, *supra* note 26, at 907–908 (“The mandatory order to mediate has not been heavily litigated in Florida.”). Mandatory mediation has arguably played a major role in educating legal and lay communities about mediation, laying the groundwork for broader use of that process and other alternatives. Whether mandatory mediation will be an essential component in programs of the future remains to be seen, although it is a common feature of federal and state programs. *See PLAPINGER & STIENSTRA*, *supra* note 24, at 66 (stating that most federal mediation programs authorize judges to order parties to mediation without their consent).

Although the American Bar Association officially opposes court-mandated arbitration, the Legislation Committee of the ABA Dispute Resolution Section may propose that pending federal legislation be revised to drop mandatory arbitration provisions and substitute a provision that would grant federal district court specific power to mandate mediation in appropriate cases. *See Memorandum from Cecilia Morgan, R. Larson Frisby et al., to Council, ABA Section of Dispute Resolution 2,3* (Jan. 15, 1998) [hereinafter ABA Legislation Memo]. In a recent fax poll on court-connected ADR conducted by the CPR Institute for Dispute Resolution of member attorneys, 43% of those responding preferred court programs where ADR use was completely optional. Another 38% preferred programs which gave the parties a choice of ADR process. *See CPR Fax Poll, How much experience do you have with ADR and has it helped resolve your cases?* (Oct. 31, 1997) (on file with author).

techniques—that is, which factor in some perspectives on party rights and power issues.³⁷ A common practice in mediation of personal injury and malpractice cases is for the neutral (usually an experienced trial practitioner) to offer a confidential prediction of the fate of a case in litigation, administering the dose of reality that will trigger more realistic assessments of settlement prospects.³⁸ This narrowly focused evaluative model reflects not only the de facto breadth of the “mediation” label, but also the impact of the trial lawyer’s perspective on court-annexed mediation.³⁹

Finally, the conceptual simplicity of mediation may lead some to infer that a mediation program may be developed and administered with commensurate ease. As experienced sponsors will attest, however, a well-administered mediation program may actually entail greater effort than similar efforts focusing on nonbinding arbitration or evaluation.⁴⁰

³⁷ See PLAPINGER & STIENSTRA, *supra* note 24, at 65–66 (discussing the emergence of “facilitative” and “evaluative” approaches among mediators in court-annexed programs); see also NATIONAL SYMPOSIUM, *supra* note 24, at ix (observing that ADR research is complicated by range of so-called mediation processes). Some courts provide specific guidelines for mediator strategies, others do not. See PLAPINGER & STIENSTRA, *supra* note 24, at 65–66.

The practice of employing evaluative strategies in mediation has fueled a continuing debate among those who believe that such approaches are functionally distinct from mediation and those who do not. See, e.g., James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997) (dialogue presenting various viewpoints on the issue); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996); Kimberlee K. Kovach & Lela P. Love, “*Evaluative Mediation*” is an *Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

As we will see, wide variances in mediator styles and strategies are observable in mediation of construction contract disputes. See *infra* Section IV.C.

A helpful, straightforward guide to understanding the range of approaches in the field is set forth in Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) (providing a graphic tool for analyzing mediator approaches).

³⁸ See, e.g., PROVINCE, *supra* note 27, at 51–57 (discussing evaluative procedures involving “lawyer-mediators”). Indeed, the recognition of this fact of life has prompted more than one local program to consider instituting a nonbinding evaluation program for certain classes of cases. But see *infra* text accompanying note 43.

³⁹ As we will see, the influence of trial lawyers is also evident in one evolutionary strand in the consensual arena. See *infra* Section IV.C.

⁴⁰ See generally Press, *supra* note 26 (discussing the continuing evolution of a regulatory structure for court-connected mediation in Florida). Identifying, training and

An extensive survey of the federal system reveals that although nonbinding arbitration is an option in a number of programs, it is not nearly as popular as mediation.⁴¹ In the state courts, nonbinding arbitration programs were organized in a number of states by the late 1980s.⁴² A number of programs have since been abandoned, however, and the rate of program adoption has dropped off steeply since 1990.⁴³

The federal survey found early neutral evaluation programs in only fourteen federal courts and noted that one of the first courts to adopt the process had abandoned the procedure as "unnecessary in light of the court's substantial mediation program."⁴⁴ Summary jury trial, although authorized by many federal districts, is "used only occasionally."⁴⁵

supervising mediators is every bit as difficult as performing similar functions with respect to arbitrators and case evaluators. In light of the relative difficulty of the mediator's interactive role and critical importance of intensive skills training for mediators, it is arguably much more difficult. *See* COURT ADR, *supra* note 24, at ch. 5 (comparing qualification and training requirements for mediators, arbitrators and case evaluators in court-connected programs); *see also* NATIONAL SYMPOSIUM, *supra* note 24, at 155-171 (summarizing research on qualification and training of mediators).

⁴¹ *See* PLAPINGER & STIENSTRA, *supra* note 24, at 4; Plapinger, *Twilight*, *supra* note 24, at B25 (mediation has "eclipsed" arbitration in federal court programs under the CJRA).

⁴² *See* Susan Keilitz et al., *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, 12 STATE CT. J., Spring 1988, at 8 (stating that approximately half of the nation's state trial court systems adopted some form of mandatory court-administered non-binding arbitration by the end of the 1980s); *see also* NATIONAL SYMPOSIUM, *supra* note 24, at 37-50 (summarizing research findings relating to court-annexed arbitration programs).

⁴³ *See* Telephone Interview with Susan Keilitz, National Center for State Courts (Nov. 7, 1997). "Arbitration, once the most common ADR method [in federal court programs], saw almost no growth under the CJRA." Plapinger, *Twilight*, *supra* note 24, at B25. Recently, however, Congress permanently reauthorized the 20 federal district court pilot arbitration programs. *See* P. L. 105-53, 111 Stat. 1173 (1997). In addition, on March 3, 1997, Representative Howard Coble of North Carolina introduced a bill known as the Alternative Dispute Resolution and Settlement Encouragement Act. H.R. 2603 would, among other things, expand the use of both voluntary and mandatory arbitration in federal district courts. A related bill, S. 997, was introduced on July 8, 1997, by Senator Charles Grassley of Iowa. The ABA officially opposes the mandatory arbitration provisions. *See* ABA Legislation Memo, *supra* note 36, at 5.

⁴⁴ PLAPINGER & STIENSTRA, *supra* note 24, at 5. *See* Plapinger, *Twilight*, *supra* note 24, at B25 (noting that although the use of early neutral evaluation has expanded under the CJRA, the process "remains significantly less popular than mediation"); *see also* NATIONAL SYMPOSIUM, *supra* note 24, at 12-17 (summarizing research findings

C. *Glimmerings: Greater Breadth and Depth in Court ADR*

Although Professor Sander's vision, encompassing a synthesis of various conflict resolution approaches which enables a tailoring of the method to the matter and a dynamic response to the changing circumstances of the disputants, has not been realized, evidence suggests that many court programs and other public initiatives are evolving to embrace similar ends. Such opportunities should expand as users become more sophisticated in the application of mediation and other intervention approaches and more cognizant of the range of possibilities in and out of the court system.

1. *Polishing the Stone: Variations on the Mediation Theme*

The unprecedented focus on mediated conflict resolution, largely driven by the growth of court-annexed procedures, proved to be a wellspring of creativity in the development of variations on the mediation theme. In Kentucky, a partnering between the court system and a nonprofit mediation program has evolved in a number of different directions, with discrete procedural or mediator training guidelines for divorce and child custody disputes, personal injury actions and small claims. Other initiatives include

relating to court-annexed case evaluation programs in state and federal courts). Again, this phenomenon may be in part the result of an effective "lumping in" of evaluative processes in mediation. *See supra* note 37. During a recent meeting of the Securities Industry Conference on Arbitration, for example, discussion centered on whether an industry-sponsored pilot project on mediated negotiation should be supplemented by an early neutral evaluation program. The brief response was that, in light of the fact that so many mediators employed evaluative strategies, a separate program would be superfluous.

As noted before, of course, there are many who believe evaluative processes should be distinguished for the benefit of users. In Kentucky, a growing recognition that many users of the court-connected mediation program desire a non-binding evaluation of their case has spurred an initiative to develop a "subsidiary" voluntary non-binding arbitration program.

⁴⁵ PLAPINGER & STIENSTRA, *supra* note 24, at 68; *see also* Plapinger, *Twilight*, *supra* note 24, at B25 (noting that use of this resource-intensive process is low in federal court programs, with most courts reporting only one or two summary jury trials a year); NATIONAL SYMPOSIUM, *supra* note 24, at 17-20 (summarizing research findings relating to the use of summary jury trial in federal and state courts). "The cases for which [summary jury trial] is suitable are those in which attempts at settlement negotiations and dispute resolution processes have failed and which are on the verge of a lengthy, and costly, trial." *Id.* at 17.

a mediation program for real estate transactions, a city/county government-sponsored program for mediation of planning and zoning disputes and a nonprofit center built on a "transformative" mediation concept.⁴⁶ The relatively mature Florida program comprehends a spectrum of variations on the mediation principle and, most importantly, has spurred intense activity in the private realm.⁴⁷ Now, the reality of judicially mandated mediation has led legal practitioners to encourage clients to mediate even before filing a complaint and to select mediators of their choice.⁴⁸ In all of these ways, intense experimentation within a single ADR mode has maximized its usefulness in a wide range of applications⁴⁹ and permitted closer tailoring of the intervention strategy to the conflict.

2. Variegated Approaches: Multi-Door Programs and Stepped Processes

Despite the relative emphasis on mediation, many courts have specific authority to bring other procedures into play in appropriate cases. Plapinger and Stienstra reported it "not uncommon . . . to find at least two ADR

⁴⁶ The program was inspired by ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994). See also NATIONAL SYMPOSIUM, *supra* note 24, at 5-12, 20-31, 51-89, 113-129 (summarizing research relating to different applications of the mediation concept, including general civil case, medical malpractice, divorce and child custody, juvenile, small claims, appellate, community justice and victim-offender mediation).

⁴⁷ See generally Press, *supra* note 26; Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1993). Although it tends to be mediation-focused, Florida represents the paradigm of an active, intensive statewide program. Such efforts are significant in the current generation of ADR initiatives. See Judith M. Filner & Margaret Shaw, *Update: Development of Dispute Resolution in State Courts*, NIDR FORUM, Summer/Fall 1993, at 36, 37-38.

⁴⁸ See Press, *supra* note 26, at 908.

⁴⁹ As noted previously, there are debates about what is and is not a proper strategy in mediation. See *supra* note 37. My point is that given any particular conflict resolution approach, over time user groups will maximize their potentialities by evolving their own variants on the process. See, e.g., Section III.C.1. (addressing changes to the AAA Construction Industry Arbitration Rules). Once the limits of the process have been revealed, however, other techniques will be explored. See *supra* note 44 and see *infra* Parts IV, V.

In both public and private conflict resolution, the identity and perspective of the person(s) in control of conflict resolution strategies makes a big difference. See *infra* Section II.B.4. and Parts III, IV, V.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

procedures available in many federal courts[;] . . . at least six courts now offer a full array of options, including arbitration, mediation, early neutral evaluation, and summary jury trial."⁵⁰ They also identified state multi-door programs in New Jersey, Texas, Massachusetts and the District of Columbia.⁵¹

Perhaps the best known of federal multi-option programs is that sponsored by the Federal District Court for the Northern District of California, a pilot program superimposed on a pre-existing scheme for court referral. The program, which was developed for the express purpose of assessing the potential of various ADR processes, includes options for nonbinding arbitration, mediation, early neutral evaluation, early magistrate judge settlement conferences, later judicial settlement conferences, summary jury trial and appointment of special masters.⁵² In cases subject to the program, counsel must discuss the range of nonbinding ADR options (including court-sponsored programs and private alternatives) and, if possible, agree upon a choice. Failing agreement, the decision to refer a case to ADR may be postponed until the initial case management

⁵⁰ PLAPINGER & STIENSTRA, *supra* note 24, at 5.

⁵¹ *See id.* at 67. *See generally* NATIONAL SYMPOSIUM, *supra* note 24, at 90-112 (summarizing research on state multi-door courthouse projects). Multi-door programs were implemented in Washington, D.C., Houston, Texas, and Tulsa Oklahoma in the mid-1980s with the support of the American Bar Association's Standing Committee on Dispute Resolution. Programs were later established by other sponsors in Burlington, New Jersey and Cambridge, Massachusetts. *See id.* at 92-93.

A number of other jurisdictions, such as New Hampshire and Minnesota, permit litigants to select from a menu of ADR mechanisms. *See* COURT ADR, *supra* note 24, at 5-6. The menu approach is also appearing in some federal courts such as the Western District of Missouri. *See id.* at 6-7. Rules in a number of federal district courts and some state courts explicitly authorize judges to direct any case to any ADR process offered by the court. *See id.* at 7-9.

In San Mateo County, California, an innovative collaboration of the courts, community organizations and members of the bar promises to provide a unique multi-option ADR referral program. *See* Multi-Option ADR Project: A Partnership of the San Mateo County Courts, Bar and Community, Strategic Plan 1997-2003 (June 1997) (on file with author).

⁵² *See* PLAPINGER & STIENSTRA, *supra* note 24, at 90-102. An extended treatment of the early neutral evaluation (ENE) component of the program appeared in Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994). *See also generally* David I. Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (1989).

conference with the assigned judge. After discussing the matter in conference, the parties may agree on a procedure or the judge may refer the case to an ADR process unless persuaded that no ADR process will be beneficial.⁵³ The multi-pronged program, which is administered by a special Office of ADR Programs (assisted by a magistrate judge as liaison) functions within the framework of extensive procedural and neutral eligibility and training requirements.⁵⁴ Such an experiment, one of the closest embodiments of the Sander model, may only be possible in the context of a high-volume jurisdiction with a committee panel of judges and targeted supplementary funding.⁵⁵

In some cases, ADR approaches are being employed *seriatim*.⁵⁶ A stepped approach is a featured option of the three-track ADR program developed by the Federal District Court for the Northern District of Alabama.⁵⁷ Parties electing the option first engage in mediation. If mediation is unsuccessful the neutral proceeds to the arbitration phase during which the parties may offer evidence and arguments at a hearing which may be placed on the record. The neutral then issues a decision on the merits. If a party rejects the neutral's decision, proceeds to trial *de novo* and fails to obtain a better result, that party must pay all the opponent's costs and attorney fees incurred from the date the arbitrator received notice of rejecting the award.⁵⁸

⁵³ See PLAPINGER & STIENSTRA, *supra* note 24, at 90-92.

⁵⁴ See *id.* at 93-102.

⁵⁵ The Northern District of California was one of ten courts authorized to establish a mandatory, nonbinding court-annexed arbitration program. See 28 U.S.C. § 658(1) (1993); see also COURT ADR, *supra* note 24, at 25-26 (describing differential case management or "case tracking" systems which assign cases to different ADR schemes based on various criteria).

⁵⁶ Stepped approaches have long been employed under American automobile lemon laws. In many cases an unhappy customer's complaint sets into motion an informal telephonic mediation process which results in satisfactory settlement. If not, the case is put before an arbitration panel which renders a decision which binds the auto manufacturer but not the customer; the latter still has the option of a *de novo* court trial.

⁵⁷ See PLAPINGER & STIENSTRA, *supra* note 24, at 73-76. The program permits counsel to meet with the court soon after the filing of a complaint to determine whether the case is appropriate for mediation, a mediation-arbitration option or some other form of court-sponsored or private ADR, including summary jury trial. (The mediation option was, with few exceptions, the most widely elected at the time of reporting.) See *id.*

⁵⁸ See *id.* at 75.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

In the last decade, federal and state agencies have reacted to a series of mandates to embrace ADR.⁵⁹ The Veterans Administration Contract Appeals Board (VACAB) provides an example of the kind of creative, flexible approach that may become increasingly common in the fourth branch of government. VACAB, like other tribunals established to adjudicate appeals of government contract claims, was an experiment in ADR. Congress, however, gave VACAB and other contract appeals boards conflicting marching orders.⁶⁰ On the one hand, the boards were to proceed in a quick, informal manner to avoid the delays and inefficiencies of traditional litigation. On the other hand, they were admonished to act like a federal district court—to make a record and to provide both parties with a full and fair opportunity to present their case, including full discovery rights. The result was that VACAB and other appeals boards fell prey to the same inefficiencies and delays as courts of more general jurisdiction. Then came the Administrative Dispute Resolution Act of 1990,⁶¹ which admonished appeals boards and other administrative agencies to develop alternatives to traditional adjudicative procedures. Responding to this

⁵⁹ Federal agencies were required to adopt an ADR policy by the Administrative Dispute Resolution Act of 1990 (ADRA), 5 U.S.C. §§ 581-593 (1990). The use of ADR was also encouraged by an Executive Order during the Bush Administration. See Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778, 57 Fed. Reg. 3640, 3641 (Dep't Justice 1992). See generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987); Frank Carr et al., *The Untapped Potential of ADR in the Construction Industry*, 42 FED. LAW., June 1995, at 32; Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1; Maria R. Lamari, *The Role of Alternative Dispute Resolution in Government Construction Contract Disputes*, 23 HOFSTRA L. REV. 205 (1994).

In the construction arena, the U.S. Army Corps of Engineers has pioneered the use of a wide range of alternative dispute resolution approaches, as well as facilitated "partnering" and consensus building initiatives aimed at improving communications among project actors and other "stakeholders" in Corps projects. See generally PARTNERING, CONSENSUS BUILDING, AND ALTERNATIVE DISPUTE RESOLUTION, CURRENT USES AND OPPORTUNITIES IN THE U.S. ARMY CORPS OF ENGINEERS (IWR Working Paper No. 96-ADR-WP-8, May 1996) [hereinafter IWR WORKING PAPER]. See *infra* Part V.

⁶⁰ See Guy H. McMichael, III, *ADR at the Veterans Administration Board of Contract Appeals*, Commonwealth Council for Cooperation in the Construction Community, Louisville, Kentucky, Jan. 14, 1994.

⁶¹ 5 U.S.C. §§ 581-593 (1990).

challenge, the Department of Veterans' Affairs (VA) developed a menu of options available to parties at the time a case is filed. Typically, the choice involves abbreviated presentations, usually lasting a day or less, before a settlement judge. The settlement judge, either an outside neutral or a board judge recused from later hearing the case, renders a nonbinding opinion to inform the parties of the strengths and weaknesses of their case. The precise form of the hearing, the selection of the judge and other features of the process are determined by the parties. The neutral is also responsible for various aspects of case management. Chief Administrative Judge Guy McMichael indicates that eighty-five percent of cases referred to such processes settle. In light of this success within the appeals system, the VA is considering a pilot project which would involve third-party participation in ADR prior to initiation of the appeals process. As in other cases, the process of exploring ADR options would typically be initiated by a member of the board assigned for the purpose.

3. The Evolving Roles of Magistrates and Other Neutrals in ADR and Case Management

A more subtle but highly significant theme in recent court ADR is the expanding role of the magistrate judge, the special master and other court-appointed neutrals. At least one-third of federal courts have designated magistrate judges as the primary settlement officer;⁶² some courts rely heavily on the case management assistance of special masters and other neutrals. Their function is, increasingly, to explore a range of conflict resolution strategies, to tailor methods to the issues at hand and to respond dynamically to the circumstances of the case and the needs of the parties.⁶³

Magistrate judges have come to play a key role in many federal district court programs.⁶⁴ Their evolution as "chief ADR officers" for a court

⁶² See PLAPINGER & STIENSTRA, *supra* note 24, at 6.

⁶³ These developments appear to be part of a larger trend to integrate more closely ADR and the management of the overall case. As Plapinger and Stienstra observe, "the newer forms of ADR expect the judge to be very much at the center of ADR use," educating parties about the possibilities and exploring ADR options. *Id.* at 7.

⁶⁴ See, e.g., PLAPINGER & STIENSTRA, *supra* note 24, at 230-236 (summarizing the magistrate judge-supervised program in the Western District of Oklahoma); Resnik, *supra* note 1, at 248 (concluding that ADR was one of several factors prompting Congress to authorize increased reliance on magistrate judges); Weinstein, *supra* note 1, at 271-272 (discussing role of magistrate judges in coordinating all pretrial discovery

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

system offers several important benefits. First of all, the arrangement bifurcates the adjudicative function and settlement functions of the court, preserving the integrity of the trial process while permitting greater flexibility in the process of encouraging settlement. It also encourages the development of a cadre of professionals with a breadth and depth of ADR experience beyond the typical part-time neutral. A fully dedicated master "ADR manager" is arguably the most effective means of exploiting the potentialities of ADR intervention strategies and related case management opportunities within the judicial system.⁶⁵ Their involvement at the critical juncture of case and court process offers the possibility of informed and deliberate consideration of multiple doors and multiple paths, including sophisticated hybrid approaches, with the advice and consent of the parties. ADR choices may be considered alongside other case management issues, including discovery and dispositive motions. Although the magistrate's role is in some respects the functional equivalent of the screening clerk of the Sander multi-door courthouse, magistrates may bring into play greater preparation, broader discretion and coercive authority and greater emphasis

and performing factfinding regarding pretrial issues in the Eastern District of New York); *see also* COURT ADR, *supra* note 24, at 26-27 (describing court programs employing professional ADR "suitability screeners" to match cases to particular ADR processes).

⁶⁵ The recent Rand study on ADR and other forms of case management in various federal district courts concluded that "increased magistrate judge activity on civil cases is a strong and statistically significant predictor of greater attorney satisfaction," in part because of their relative accessibility to parties. KAKALIK ET AL., *supra* note 24, at 21.

In one "procedurally remarkable" case, the parties agreed that a federal magistrate would "act as arbitrator" to resolve any impasses on elements of loss in a contract action. *See generally* DDI Seamless Cylinder v. General Fire Extinguisher, 14 F.3d 1163 (7th Cir. 1994). With some tongue-in-cheek asides on the subject of judges moonlighting as arbitrators, Judge Richard Posner upheld the agreement as an inartful attempt to structure "an abbreviated judicial procedure rather than an unauthorized arbitral one." *Id.* at 1165-1166.

In the United Kingdom, commercial disputes may be referred to the Official Referee's Court. In such cases the referee assigned to the case is not authorized to discuss settlement with the parties, but will attempt, by ordering disclosure of documents, exchange of expert's reports and other information, to afford both parties an objective view of their opponent's case and their own prospects of success. The referee may also order a meeting of the experts to attempt to stipulate to technical facts and to narrow issues. The result is that approximately 85% of the cases referred to referees settle between the time of filing and the date fixed for trial. *See* Judge John Newey, *The Construction Industry*, in CONSTRUCTION CONFLICT MANAGEMENT AND RESOLUTION 21, 24 (Peter Fenn & Rod Gameson eds., 1992) [hereinafter FENN & GAMESON].

on the needs of the particular conflict, and more involvement of the affected parties.⁶⁶ Their continuing participation, coupled with an opportunity for appropriate evaluation and feedback by users of the program, enhances the likelihood of developing an institutional memory regarding ADR options and related case management issues.

Special masters⁶⁷ and other court-appointed neutrals may also perform tasks which transcend the more traditional focus on factfinding, evaluating or facilitating resolution of substantive issues. Some courts now utilize special masters for all aspects of pretrial case management, usually with the deliberate intention of preparing the case for mediation or other intervention aimed at resolving disputes short of trial. In California, for example, a number of courts are coupling a voluntary or compelled case management order with the appointment of a special master to manage litigation, including complex multiparty disputes such as construction defect cases.⁶⁸ The special master, typically a retired judge or attorney with pertinent expertise, manages limited discovery and investigation and then mediates the case or facilitates ADR with another third-party neutral.⁶⁹

⁶⁶ See *supra* note 22 (discussing four factors for enhancing the "match" between conflict and approach); see also Stempel, *supra* note 1, at 370-373 (proposing that Sander's "screening clerk" be replaced by "a judicial officer of substantial training and discretion" who may "require basic but modest discovery . . . in order to determine which ADR method to require" or what other alternatives, such as a dispositive ruling, might be appropriate).

The example *par excellence* of the sophisticated magistrate judge is Wayne Brazil, who has frequently reflected in print upon his wide experiences with intervention strategies in the federal court system. See generally WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (1988).

⁶⁷ Under the Federal Rules, special masters may be appointed when "the issues are complicated" and "only on a showing that some exceptional condition requires it." FED. R. CIV. P. 53(b). Within the scope of the judicial order of referral, special masters have a good deal of flexibility to tailor procedures "to the particular requirements of the case." Weinstein, *supra* note 1, at 271.

⁶⁸ See Richard H. Glucksman & Glenn T. Barger, *Managing Construction Defect Cases*, LAW., July 1996, at 7.

⁶⁹ See *id.* at 8, 11; John R. Griffiths, Use of Special Masters to Facilitate Early Settlements (Nov. 3, 1993) (outline describing role of court-appointed special master for case management and mediation of disputes, with exemplary pretrial orders) (on file with author); see also *Lelsz v. Kavanagh*, 112 F.R.D. 367, 370 (N.D. Tex. 1986) (holding appointment of special master to implement settlement agreement was appropriate); John W. Cooley, *Query: Could settlement masters help reduce the cost of*

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

In some courts, mediators facilitate information exchange and work with the parties and the court to find the most effective method for resolving the case.⁷⁰ In the Northern District of California, even case evaluators sometimes help the parties develop a discovery plan and schedule follow-up negotiation sessions.⁷¹ In this way, court-appointed neutrals, like magistrate judges, may serve as "process architects."⁷²

litigation and the workload of federal courts?, 68 JUDICATURE, 59, 59-60 (1984) (describing pioneering efforts in the use of settlement masters in federal courts).

Of course, special masters have been utilized to assist in case management in a number of widely-publicized complex tort cases. *See, e.g.*, Eric D. Green & Francis E. McGovern, Ohio Asbestos Litigation, Case Management Plan and Case Evaluation and Apportionment Process, Judge Thomas D. Lambros, United States District Court for the Northern District of Ohio (1983) (on file with author). Among the best known of special masters, Francis McGovern continues to be a leading innovator in the development of new strategies for resolution of mass tort cases. *See, e.g.*, Frances E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 U.C.L.A. L. REV. 1851 (1997). The use of court-appointed settlement masters has raised a number of concerns, including lack of pertinent experience in the neutral, and excessive costs. *See* Richard Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53.

⁷⁰ *See, e.g.*, Ronald H. Kahn, A Mediation Protocol for the Complex Case, Presentation to Division 1, ABA Forum on the Construction Industry Annual Meeting (Apr. 25, 1997) (on file with author). My own experience as a special master in federal district court was a traditional appointment as a neutral factfinder with no responsibilities for managing the case prior to trial. As a federal court mediator, however, I have, among other things, supervised limited information exchange in furtherance of settlement discussions, arranged for court hearings on selected issues by agreement of the parties and facilitated the appointment of arbitrators for out-of-court adjudication of a major commercial case.

⁷¹ *See* PLAPINGER & STIENSTRA, *supra* note 24, at 100; *see also* NATIONAL SYMPOSIUM, *supra* note 24, at 45-46 (discussing handling of discovery and discovery-related motions by court-appointed arbitrators).

⁷² Of course, unless an outside court-appointed neutral has extensive experience within the court system, she may be less effective than a magistrate judge in addressing larger case management issues. As is always the case with independent contractors, moreover, there may also be legitimate concerns regarding quality control. *See* Stempel, *supra* note 1, at 373-374. Finally, the costs associated with an outside neutral may be significant. In some cases, such expenses may become a strategic consideration.

Outside neutrals may, of course, work in tandem with judges or magistrate judges. *See* Weinstein, *supra* note 1, at 270 (discussing Judge Weinstein's use of magistrate judges and special masters in complex multiparty litigation). In one case I performed the role of early neutral evaluator, and the magistrate mediated the subsequent negotiations.

In all of these ways, court programs imbue some or all of the attributes of the multi-door courthouse in case management programs. If such is the range of experimentation within the public justice system, what might be accomplished by the consensual arrangements of private parties, acting within a long tradition of out-of-court conflict management? That is the question to be considered in the context of a veritable minefield of conflict—the U.S. construction industry.

II. CONSENSUAL APPROACHES IN A CRUCIBLE OF CONFLICT

A. *The Need for "Proper Structures"*

An earlier study detailed the factors which make the process of creating and improving the built environment a "recipe for conflict":⁷³ (1) a unique undertaking by a large and varied cast; (2) performance over an extended period of time and in a wide variety of environmental conditions; (3) a complex one-of-a-kind product and (4) modern delivery systems, which sometimes fragment work efforts and emphasize speed over other concerns.⁷⁴ In the face of these realities, even the most assiduous contract drafting has proven ineffective. The use of contract boilerplate has

The evolution of ADR "conflict managers" within the court system provides a helpful analogy for more ambitious facilitation schemes in the arena of relational contracting. See *infra* Part VI.

⁷³ See Ron Baden Hellard, *Construction Conflict-Management and Resolution*, in FENN & GAMESON, *supra* note 65, at 35 (Peter Fenn & Ron Gameson eds., 1992) [hereinafter FENN & GAMESON]. See generally Stipanowich, *Beyond Arbitration*, *supra* note 2, at 31. This study followed up on an earlier empirical treatment of binding arbitration. See generally Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988) [hereinafter Stipanowich, *Rethinking Arbitration*]. See *infra* text accompanying notes 108–146.

⁷⁴ Since World War II the industry has moved from the scenario in which work was carried on by a single contractor who employed nearly all tradesman to a position in which most of the work is performed by specialty contractors. See Steven T. Halverson, *The Future of the Construction Industry*, SURETYSCOPE, Autumn 1994, at 3. Increasing budget and time constraints on designers make it more likely that details of the design will be omitted. See generally S. G. Revay, *Can Construction Claims Be Avoided?*, in FENN & GAMESON, *supra* note 65, at 202 (discussing Canadian survey of hundreds of North American projects).

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

expanded with the perceived risks of contracting in the postwar era. Such boilerplate is at best a Band-Aid and at worst salt in the wound.⁷⁵

Contractual arrangements facilitating building design and construction are the ultimate evocation of the "relational" contract paradigm explored by Macneil,⁷⁶ Macaulay⁷⁷ and others.⁷⁸ The relational theorists pointed up the shortcomings of classic contract theory in the context of extended commercial relationships,⁷⁹ in which the discrete front-end bargain may be of less significance than norms and standards which evolve during the

⁷⁵ See Stipanowich, *Beyond Arbitration*, supra note 2, at 73, 76. A recent empirical study of the British construction industry suggests that "projects were completed successfully in spite of the contract documents, rather than because of them." Sandi Rhys Jones, *How Constructive is Construction Law?*, 10 CONSTRUCTION L.J. 28, 33 (1994).

⁷⁶ See generally IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983); Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 NW. U. L. REV. 1018 (1981) [hereinafter Macneil, *Economic Analysis*]; Macneil, *Adjustment*, supra note 4; Macneil, *Primer*, supra note 3; Macneil, *Many Futures*, supra note 32.

⁷⁷ See generally Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter Macaulay, *Non-contractual Relations*]; Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 L. & SOC. REV. 507 (1977) [hereinafter Macaulay, *Elegant Models*]; Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 [hereinafter Macaulay, *Empirical View*].

⁷⁸ See, e.g., Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990); Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982); Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369 (1981); Oliver E. Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. ECON. BEHAV. & ORG. 5 (1980); Oliver E. Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) [hereinafter Williamson, *Transaction Cost*].

⁷⁹ See Macaulay, *Elegant Models*, supra note 77, at 508-509. A condensed list of the differences between contractual relations and discrete transactions include considerations relating to: (1) commencement, duration and termination; (2) measurement and specificity; (3) planning; (4) sharing vs. dividing benefits and burdens; (5) interdependence, future cooperation and solidarity; (6) personal relations among, and numbers of, participants; and (7) power. See Macneil, *Economic Analysis*, supra note 76, at 1041-1056.

course of performance⁸⁰ and relationships of trust and confidence between individual actors.⁸¹

In such transactions, moreover, change is inevitable, as heavily integrated procedures in construction contracts attest. Adjustments may be necessary due to modified plans, misunderstandings, external events and the very translation of promise into action.⁸² Even well-planned transactions cannot address all contingencies and may leave considerable room for differing interpretations.⁸³ In many cases, to the chagrin of transactional counsel, the client's desire to get the deal done leads to purposeful vagueness.⁸⁴ Prenuptial optimism also leads to an underemphasis on the effect of nonperformance or defective performance.⁸⁵

Most of the time, adjustments will occur without dispute. When disputes do occur, they are frequently settled without resort to contract terms or the threat of legal sanctions—often because of personal relationships between individuals at the interface of the contractual relationship.⁸⁶ But when these informal processes fail and parties must turn to the legal system for assistance, the realities of the relational contract collide with a formalistic system which assesses risks and assigns blame by an inordinate emphasis on the original agreement and past events.⁸⁷ The rules which help courts to resolve cases may seem particularly inappropriate to parties in a contractual relationship; the system, which is

⁸⁰ See Macneil, *Many Futures*, *supra* note 32, at 733–734; see also Williamson, *Transaction Cost*, *supra* note 78, at 238. Williamson observed “that specialized code words or expressions can and do arise in the context of recurring transactions.” *Id.* at 243. This specialized vocabulary may yield economies within the relationship, but also operates as a barrier between those inside and those outside the relationship. See *id.*

⁸¹ See Williamson, *Transaction Cost*, *supra* note 78, at 240.

⁸² See Macneil, *Adjustment*, *supra* note 4, at 873–875.

⁸³ See Macaulay, *Non-contractual Relations*, *supra* note 77, at 58 (relating statements by some in manufacturing business that most contract disputes arise as a result of ambiguity in specifications).

⁸⁴ See *id.* (explaining that such practices persist despite disagreement on the details); see also *id.* at 59 (describing the realities of “the battle of the forms”); *id.* at 66 (providing a treatment of the differing perspectives of salespersons and attorneys).

⁸⁵ See *id.* at 60.

⁸⁶ See *id.* at 60–67.

⁸⁷ See Macneil, *Adjustment*, *supra* note 4, at 890–891; cf. J.D. Nyhart & E.A. Dauer, *A Preliminary Analysis of the Uses of Scientific Models in Dispute Prevention, Management and Resolution*, 1986 J. DISP. RESOL. 29, 32–33 (discussing the disadvantages of traditional litigation).

only indirectly a mechanism for cooperative problem solving, may not only ignore but also do serious harm to the relationship.⁸⁸ The result may be a net loss for both or all parties.⁸⁹

Because the legal system provides limited assistance in effective governance of long-term relationships, contracting parties are well advised to develop internal governing structures commensurate with the specific character and circumstances of the transaction and the goals of the parties to the relationship—a system that not only appreciates the essential characteristics of the relationship as it has evolved, but also anticipates its continuing evolution in accordance with the aspirations of the contracting parties.⁹⁰ The longer and more complex the relationship, the more emphasis can and should be placed on the development of such mechanisms.⁹¹ Macneil offered the example of the collective bargaining

⁸⁸ As Macneil puts it, “[s]uch a system will . . . continue to rub in an unnecessarily abrasive manner against the realities of coexistence with relational needs for flexibility and change.” Macneil, *Adjustment*, *supra* note 4, at 888. See also Williamson, *Transaction Cost*, *supra* note 78, at 256 (quoting remarks of Mr. Justice Rehnquist, The Adversary Society, Baron di Hirsch Meyer Lecture, University of Miami School of Law, Feb. 2, 1978).

⁸⁹ On the other hand, Macaulay argues, partial but incomplete use of the litigation process may serve several functions, including relieving private decisionmakers of immediate responsibility for handling problems, placing official sanctions upon negotiated concessions, providing an ever-growing body of information regarding the risks and rewards of various alternative courses of action and serving as a looming threat which tends to keep managers and negotiators honest. See Macaulay, *Elegant Models*, *supra* note 77, at 517–518. To an extent, of course, these same goals may be fulfilled by nonbinding third-party evaluative processes. See *infra* Section IV.B.

⁹⁰ See Macneil, *Adjustment*, *supra* note 4, at 895, 898.

⁹¹ Unlike the discrete transaction in which planning focuses on the substance of the exchange, in the relational contract “the planning of processes for conducting exchanges and other aspects of performance in the future, as well as conducting further planning, assume equal or even greater importance.” Macneil, *Economic Analysis*, *supra* note 76, at 1029–1030. Oliver Williamson posited that a trilateral system of governance (involving binding arbitration) will be sufficient when parties only occasionally enter into mixed or idiosyncratic transactions (those market transactions which are not purely discrete). See Williamson, *Transaction Cost*, *supra* note 78, at 249–254. As the transaction becomes more idiosyncratic and uncertainty increases, it becomes more and “more imperative that the parties devise a machinery to ‘work things out’—since contractual gaps will be larger and the occasions for sequential adaptations will increase in number and importance.” *Id.* at 254. The recurrent or ongoing nature of the relationship will permit the cost of the specialized government structure to be recouped. See *id.* at 250.

agreement, with its stepped, variegated procedures for addressing labor grievances.⁹²

B. *Factors Shaping Structural Evolution*

Given the mix of circumstances—a long-term, high stakes endeavor fraught with many and varied perils, a large cast of participants with overlapping needs and interests, an endemic mistrust of the court system and a great freedom to explore consensual governance mechanisms—one would reasonably expect the construction industry to be in the forefront of development of new conflict resolution strategies and techniques. Indeed, the industry has always embraced out-of-court conflict resolution and is today a laboratory for experimentation not only in conflict resolution processes, but in approaches aimed at enhancing group communications, prospective problem solving and minimizing job-site conflict. For a number of reasons, however, present-day realities are less the result of a gradual evolution than a wave of reaction by an industry to the perceived inadequacies of traditional approaches and a range of responses reflecting different professional perspectives.

1. *Spurs to Change*

The wave of reform which recently swept over conflict resolution in the construction industry reflects a confluence of two developments: (1) widespread industry dissatisfaction in the wake of a gradual but dramatic increase in the volume of construction-related litigation and arbitration, mirroring trends in other contractual realms and (2) parallel experimentation with settlement-oriented processes by courts and agencies.

In the years following World War II, the expanding volume of public and private construction, increasing competition, the evolving new building technologies and changing concepts of liability led to an increase in construction conflict and the coalescence of a growing corps of lawyers

⁹² See Macneil, *Primer*, *supra* note 3, at 684–685; *cf.* URY ET AL., *supra* note 14, at 101–133 (describing design of a conflict management system for labor-management relations at a coal mine). As we will see, stepped approaches are becoming increasingly common in contractual governing structures. See *infra* text accompanying notes 257–266.

specializing in such cases.⁹³ These realities stimulated a variety of responses and, ultimately, a re-evaluation of traditional approaches to conflict.

Current developments in the construction industry are part of a more comprehensive revolution in conflict resolution which led to the evolution of the public sector programs described in Part I. Parties and attorneys, confronted with new approaches in courts and agencies, naturally pondered their applicability in the private realm.

But the path to the present day was (and remains) strewn with obstacles, including the inertia of traditional processes, the difficulty of tailoring all-purpose conflict resolution programs *ab initio* (at the time of contracting and prior to the emergence of conflict) and the differing perspectives of lawyers and nonlegal professionals and businesspersons.

2. Traditional ADR and Process Inertia

The construction industry long adhered to its own patented brand of ADR: an initial evaluation by the project architect or engineer and, if necessary, binding arbitration (usually before an AAA tribunal).⁹⁴ The two-step system was itself a recognition of the need for specialized internal mechanisms aimed at addressing conflict early and efficiently—and in a manner acknowledging the special customs, practices and interests of contracting parties. As most performance issues were likely to be of a technical variety, the notion of referring questions to the architect or engineer who designed the project had a lot of appeal. In addition to providing technical expertise, the project's creator would be in the best position to clarify the design intent and reliably inform the process of working out the problem. In the event that this first-tier determination did not resolve the conflict, the possibility usually existed to submit the matter to arbitration before a panel of industry "insiders" with a mixture of expertise. Even here, the goal would be resolution of job-site conflict with minimal negative impact on project progress.

Until very recently that template, if not accepted unquestioningly as standard boilerplate, established the parameters for the conflict resolution

⁹³ See Joseph Dundin, *A Hundred Years (Or So) of AIA Standard Documents*, ARCHITECTURE: THE AIH JOURNAL, Oct. 1988, at 119. But cf. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 11-15 (1994) (discussing political culture, justice and a fragmented government).

⁹⁴ See *infra* Part III.

debate.⁹⁵ Ultimately, however, these time-honored mechanisms for resolving conflict—a preliminary determination by the project design professional followed, if necessary, by binding arbitration—were held up to the harsh light of public scrutiny and found wanting in the eyes of contemporary disputants.⁹⁶ Yet even today, the old two-step program remains a common starting point for reform efforts.⁹⁷

3. *Difficulties of Front-End Contingency Planning*

Another barrier to change in this consensual arena is, ironically, the world of possibilities inherent in long-term contractual relationships. Although ADR planners addressing a specific commercial setting have a considerable advantage over the typical court program planner in that their purview is much more focused, it is still difficult to design a template compatible with all contingencies. Contractual conflict resolution provisions must provide a framework which grapples more or less successfully with everything from a minor dispute over the profile of a curb to an aesthetic question regarding the precise tint of a brick to megaconflicts implicating multiple parties and multiple legal and factual issues. At the same time, it must necessarily limit the ambit of mutual choice after disputes have arisen—for the simple fact that in the wake of disputes, it is often difficult to agree about anything. Unlike the court system, where a judge may mandate participation in ADR, there is no third party to offer impartial advice and, if appropriate, directives regarding engagement in ADR. Thus, contractual ADR provisions place heavy emphasis on fixed menus and default mechanisms.⁹⁸

4. *Differing Perspectives*

Discordant perspectives among major industry actors are another factor affecting the pace and direction of innovation. Although it would be an oversimplification to portray the problem as nothing more than a schism

⁹⁵ See *infra* text accompanying notes 110–114; 199–205.

⁹⁶ As Ury, Brett and Goldberg would put it, conflict resolution in the construction industry was a “system in distress.” URY ET AL., *supra* note 14, at 30. See *infra* Sections III.A., III.B; IV.B.

⁹⁷ See *infra* Parts III, IV.

⁹⁸ See *infra* text accompanying notes 149–163; 249–251; 255–260.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

dividing lawyers and clients,⁹⁹ there is no question that professional and business perspectives have everything to do with the way one defines a problem and, thereby, permissible solutions.

A decade ago, many industry actors—contractors, owners, design professionals, insurers and sureties, and others—were beginning to re-examine and put into practice the principles which animated traditional approaches to conflict. Among other things, they reached the following conclusions:

- (1) Most parties in the relational environment of construction have mutual interests and goals which are best served by preserving relationships and facilitating performance;
- (2) The failure to identify or to promptly and properly respond to issues—even insignificant ones—may sow the seeds of serious conflict;
- (3) The best time to resolve construction contract disputes is as early as possible, before positions harden, costs mount and conflict poisons the job environment.¹⁰⁰

Their efforts have been enhanced by the growing opportunities to employ approaches aimed at finding integrative solutions rather than defending positions and competing for tactical advantages.¹⁰¹

Many lawyers, on the other hand, have moved toward this realization cautiously and, in some cases, reluctantly, preferring instead to approach innovation incrementally: changing the rules of engagement, setting higher standards for neutrals and, if necessary, adopting a few new tools. A decade ago, professional debates centered on modifying the existing arbitration system; today, attorneys are still adjusting to the advent of new ADR approaches in the public justice system and an increasingly restive, activist client base.¹⁰²

⁹⁹ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 77–78.

¹⁰⁰ See Newey, *supra* note 65, at 21, 24.

¹⁰¹ See P.D. Gardner & J.E.L. Simmons, *The Relationship Between Conflict, Change and Project*, in FENN & GAMESON, *supra* note 65, at 110, 112. Building contracts in China usually contain a provision that the parties will attempt to settle disputes prior to adjudication. See Anthony Houghton, *Alternative Dispute Resolution—A Far East Perspective*, in FENN & GAMESON, *supra* note 65, at 298, 300.

¹⁰² See CPR INSTITUTE FOR DISPUTE RESOLUTION, *BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT 7* (Catherine Cronin-Harris ed., 1997) [hereinafter *BUILDING ADR*] (noting likely resistance to change by in-house attorneys and outside counsel).

At the same time, major segments of the construction industry see lawyers as the problem¹⁰³ and seek true reformation in approaches to conflict. Their return to first principles involves a metaphorical cleansing of the temple which restores control of conflict resolution to those who own, design and build buildings and consigns legal advocates to the back porch—if not the outer darkness.

The realities of process inertia, the limitations of front-end program design and the impact of discordant perspectives will be evident at each point in our progression from the “old ADR”—site-based professional evaluation followed by binding arbitration¹⁰⁴—to a rethinking of settlement-oriented approaches using third-party intervenors,¹⁰⁵ to partnering arrangements¹⁰⁶ and beyond.¹⁰⁷ Whatever the limitations, recent developments portend a future for variegated systems tailored to the particular needs of the parties and the issues in dispute—a private structure imbued with the positive attributes of the multi-door courthouse.

III. STASIS IN CONSENSUAL CONFLICT RESOLUTION: REFORM OF THE ADJUDICATORY PROCESS

A. Arbitration: The “Old ADR”¹⁰⁸ Experiences Growing Pains

The construction industry, like some other commercial sectors,¹⁰⁹ has always placed strong emphasis on resolving grievances and disputes

During a recent long-range planning session involving 28 leaders of the construction bar which I facilitated, I queried the group regarding trends in professional practice. The group identified changing approaches to conflict and expanding use of conflict avoidance and resolution mechanisms as one of the major challenges for practitioners in the coming decade). See Thomas J. Stipanowich, Facilitator’s Report on Long Range Planning Session, American Bar Association Forum on the Construction Industry (July 10, 1997) (on file with author) [hereinafter Stipanowich, Facilitator’s Report].

¹⁰³ See, e.g., Ronald S. Davies, *Construction Conflict—The Specialist Contractor’s View*, in FENN & GAMESON, *supra* note 65, at 59, 61 (complaining that construction industry was at the mercy of lawyers and accountants).

¹⁰⁴ See *infra* Part III.

¹⁰⁵ See *infra* Part IV.

¹⁰⁶ See *infra* Part V.

¹⁰⁷ See *infra* Part VI.

¹⁰⁸ Stempel, *supra* note 1, at 334.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

informally, efficiently and outside the court system. Motivated by the desire to achieve a profit and to maintain good working relations with clients and other project participants, most successful design and construction businesses generally sought to avoid the burdens of litigation, including potentially disastrous consequences for project management and morale. If something more than face-to-face negotiation was required, the choice was typically an informal process guided by one or more informed industry insiders. Traditionally, as we have seen, this usually meant referring disputes and other questions to the project architect or engineer, who rendered an advisory (or, under some arrangements, a binding) determination,¹¹⁰ followed by binding arbitration.¹¹¹ In the AIA document system, these mechanisms were collectively enshrined in an increasingly complex dispute resolution process.¹¹² For parties designing construction contracts, arbitration before an impartial panel held out the promise of an expedited, private hearing before one or more experts—often a panel offering a range of pertinent knowledge and experience. The common goal was a quick and final resolution of construction-related controversies guided by technical principles and familiar commercial norms rather than the “over-objectivity” borne of ignorance. Through the use of neutrals conversant in the language and norms of the relationship, arbitration held out the promise of an equitable result and a rectification of the law where the law was defective because of its generality.¹¹³

¹⁰⁹ See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

¹¹⁰ See JUSTIN SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* 519–520 (2d ed. 1977); Stipanowich, *Beyond Arbitration*, *supra* note 2, at 54–55.

¹¹¹ See generally JAMES ACRET, *CONSTRUCTION ARBITRATION* (1985); Stipanowich, *Rethinking Arbitration*, *supra* note 73. See also Penny Brooker & Anthony Lavers, *Perceptions of Alternative Dispute Resolution as Constraints upon its Use in the UK Construction Industry*, 15 CONSTRUCTION MANAGEMENT & ECON. 519, 519–520 (1997) (discussing role of arbitration as the British construction industry’s alternative to litigation).

¹¹² See THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201: GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION arts. 4.3–4.5 (1997) [hereinafter AIA A201]; see also Stipanowich, *Beyond Arbitration*, *supra* note 2, at 75–80. The forthcoming edition of the primary AIA documents calls for mediation of disputes prior to binding arbitration. See *infra* Section IV.C.

¹¹³ See Aristotle, *Nicomachean Ethics Book V*, in CLARENCE MORRIS, *THE GREAT LEGAL PHILOSOPHERS* 25 (1959).

That, at least, was the theory. By the mid-1980s, however, a vague sense existed that all was not well in construction industry arbitration. There were indications, if the anecdotal evidence was to be believed, that the much-vaunted advantages of private arbitration were often more ephemeral than real.¹¹⁴ The promise of an accelerated first hearing was often undercut by defenses to arbitrability and other courtroom tactics,¹¹⁵ as well as problems with ministerial staff responsible for administering the arbitration.¹¹⁶ Expecting a decisionmaker with expertise, parties were sometimes surprised and disappointed by arbitrators' paucity of pertinent qualifications.¹¹⁷ Having saved time and money by foregoing discovery, parties often found themselves mired in long, inefficient fishing expeditions at hearings, punctuated by hiatuses for midstream document exchange.¹¹⁸ Efficiency was further reduced by arbitrators' reluctance to make dispositive orders prior to full-blown hearings on the merits, or to cut off cumulative or redundant evidence.¹¹⁹ When all was said and done, justice might not have been speedier or cheaper.¹²⁰ Some came away wondering whether justice had been served by the award, a question made more difficult by the fact that arbitrators rarely issued any supporting rationale.¹²¹

Such concerns prompted the nation's largest organization of construction attorneys, the American Bar Association Forum on the Construction Industry, to survey its membership regarding experiences with arbitration under the widely-used AAA Construction Industry Arbitration

¹¹⁴ See generally Stipanowich, *Rethinking Arbitration*, *supra* note 73, at 441-453 (discussing the "other side of the coin").

¹¹⁵ See *id.* at 441-443.

¹¹⁶ See *id.* at 451.

¹¹⁷ See *id.* at 447-450.

¹¹⁸ See *id.* at 443-445, 450-452.

¹¹⁹ See *id.* at 444-445.

¹²⁰ See *id.* at 452-453.

¹²¹ See *id.* at 450. Evaluating arbitration according to the four factors advanced by Ury, Brett & Goldberg for analyzing the effectiveness of an approach to conflict resolution, (1) transaction costs, (2) satisfaction with outcomes, (3) effect on party relationships and (4) durability of solutions, there is no question that for many, arbitration added up to an unsatisfactory experience. See URY ET AL., *supra* note 14, at 11-13.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

Rules.¹²² The result, a rare glimpse into the workings of a private system, provided fodder for proponents of arbitration as well as its critics.

When it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries.¹²³ On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial,¹²⁴ and somewhat less costly overall.¹²⁵

However, a number of red flags existed, particularly among group perceptions of arbitrator qualifications, training and selection. Although most respondents rated arbitrators as generally “good” or “excellent,” more than a third found them only “fair” or “poor.”¹²⁶ Arbitrator training was, on average, deemed “fair,”¹²⁷ and much criticism was leveled at the quality of information provided by the AAA on prospective arbitrators.¹²⁸ Not surprisingly, negative views regarding the quality of arbitrators tended to translate into support for broader judicial review of arbitral awards, requirements that arbitrators prepare findings of fact and conclusions of law in support of awards, limitations on arbitral remedy-making power and less satisfaction with all aspects of arbitration.¹²⁹

Another range of concerns had to do with the differing needs of small and large cases. Attorneys and clients alike tended to be more satisfied with the speed, cost, quality of decisionmaking and fairness of arbitration in cases involving less than \$250,000, and were significantly more likely to arbitrate again.¹³⁰ Case size also had an impact on perceptions regarding procedural reforms involving prehearing conferences, statements of claim and discovery.¹³¹

The Forum inquiry also pointed out the continuing tension between the concept of arbitration as a consensual alternative to court adjudication and its growing role as a court substitute.

¹²² See Stipanowich, *Rethinking Arbitration*, *supra* note 73, at 453–472.

¹²³ Almost 40% of those responding viewed arbitrators as generally fairer than juries, while another 43% considered them equally fair. *See id.* at 458.

¹²⁴ *See id.* at 460–461.

¹²⁵ *See id.* at 461–462.

¹²⁶ *See id.* at 454–455.

¹²⁷ *See id.* at 455–456.

¹²⁸ *See id.* at 456.

¹²⁹ *See id.* at 458–459.

¹³⁰ *See id.* at 462.

¹³¹ *See id.* at 463–466.

B. The Arbitration Dichotomy: Consensual Alternative vs. Court Surrogate

There has long been a struggle implicating two models for commercial arbitration. The first, which I will call the Commercial Moot, comprehends the notion of quick, informal justice between members of a commercial community. Participants know and respect the judge, who is one of their own and who acts out of obligation, like Cincinnatus pulled from his plow. He derives authority from this fact and from the willingness of the community to acknowledge and abide by his decisions. With the help of their peer-arbitrator, the parties meet, conclude their dispute and get on with business, all without recourse to the court system. This model embodies the principles of party autonomy, arbitral expertise, speed, economy and finality.

The other model, the polar opposite of the first, is the "Total Process" afforded by the public justice system. It consists of formalized pretrial practice, including mechanisms for addressing dispositive motions, extensive discovery and third-party practice, procedural formalities to ensure the fairness of the hearing, exemplary remedies and the right to appeal.

Few (if any) would advocate either model as the all-purpose paradigm for commercial arbitration. Most would acknowledge the importance of giving parties a true choice in out-of-court process, but the model of the Commercial Moot, however appropriate it might be to, say, resolving disputes over the quality of goods, is not acceptable for the broad range of construction disputes. Usually, there will be multiple disputes and multiple disputants, one or more of whom will be from outside the construction industry and related professions. There will also be lawyers and legal issues. The problem is finding the right meld of party autonomy, efficiency and due process for a wide range of circumstances.

Thus, construction lawyers supported the use of preliminary hearings before the arbitrators for the purpose of arranging for discovery, narrowing issues and planning the hearing schedule.¹³² They favored requiring parties to provide explicit statements of claim and other information prior to hearings,¹³³ and the development of mechanisms to join necessary parties

¹³² See *id.* at 463.

¹³³ See *id.* at 465-466.

or consolidate arbitrations addressing the same disputes.¹³⁴ They also supported a rule authorizing arbitrators to order and supervise document discovery.¹³⁵

Most attorneys were, however, unwilling to support a rule authorizing pre-arbitration discovery along the lines of civil discovery.¹³⁶ They were also generally averse to a rule explicitly authorizing arbitrators to award punitive damages.¹³⁷ They were at best lukewarm toward higher standards of judicial review of arbitration awards.¹³⁸ A slight majority favored including findings of fact in awards in big cases, while a slight majority disfavored findings of fact in smaller cases.¹³⁹ The group strongly rejected including conclusions of law in awards.¹⁴⁰ Finally, lawyers voiced strong support for a rule authorizing arbitrators to award attorney fees—in part because tactical delays by lawyers required appropriate sanctions, as in court.¹⁴¹

The arbitration-as-alternative/arbitration-as-court-surrogate debate has intensified in the past decade, as arbitration has rapidly evolved into a surrogate court system.¹⁴² As arbitration has been called upon to take on

¹³⁴ See *id.* at 463.

¹³⁵ See *id.* at 464-465.

¹³⁶ See *id.* at 465.

¹³⁷ See *id.* at 467. The trend to recognize such authority in arbitrators has continued, but the issue remains a controversial one. See generally Stipanowich, *Punitive Damages*, *supra* note 1.

¹³⁸ See Stipanowich, *Rethinking Arbitration*, *supra* note 73, at 468. The inquiry was phrased in terms of an amendment to the AAA Construction Industry Arbitration Rules that would provide for greater judicial scrutiny of arbitral awards. The issue of contractual provisions for greater review has since been addressed in several decisions, with mixed results. Most support the concept. See Stipanowich, *Punitive Damages*, *supra* note 1, at 55-57.

¹³⁹ See Stipanowich, *Rethinking Arbitration*, *supra* note 73, at 469.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 461, 467. The lawyers acknowledged that fellow lawyers were the leading cause of delay in arbitration. See *id.* at 461. The request for sanctions was in effect a plea by lawyers to “save us from ourselves.”

¹⁴² Although the battle has long been portrayed as a struggle for the soul of arbitration between attorneys and businesspersons, the ABA survey and other evidence indicates that the legal profession is also divided. See, e.g., John W. Hinchey, *Do We Need Special ADR Rules for Complex Construction Cases? Yes, We Do Need Special Rules for Complex Construction Cases*, 11 CONSTRUCTION LAW., Aug. 1991, at 1;

the burden of almost the entire spectrum of civil rights and remedies—including claims for exemplary damages and class actions, Title VII cases and RICO-based claims, the needs of users have stressed and strained traditional arbitration processes to the limit and raised a host of questions regarding the structure and shape of commercial arbitration.¹⁴³ Although the debate is sharpest in other arenas such as employment¹⁴⁴ and securities brokerage arrangements¹⁴⁵ and other contexts in which adhesive elements in the contracting process raise additional concerns,¹⁴⁶ construction arbitration continues to grapple with process issues, particularly as regards the handling of complex controversies involving multiple parties: Who should make determinations regarding procedural questions affecting arbitration? How should multi-party disputes be handled? Should arbitration be administered by an impartial organization such as the American Arbitration Association, or can administrative duties be effectively handled by the arbitrator(s)? How much discovery should be available in arbitration? Should arbitrators write opinions in support of their award? Should arbitrators have the authority to award punitive damages or attorney fees?

Luther P. House & Brian G. Corgan, *No, Don't Inhibit Arbitration with Courtroom "Due Process,"* 11 CONSTRUCTION LAW., Aug. 1991, at 1.

In 1990, an ABA-sponsored task force chaired by John Hinchey attempted to formulate a number of recommendations for the industry for the handling of complex construction cases. This author, an adviser to the task force, supported some aspects of the resulting report but disagreed with other conclusions.

¹⁴³ See generally Stipanowich, *Punitive Damages*, *supra* note 1, at 5-10 (describing expansion of arbitrability concepts under Federal Arbitration Act and related challenges).

¹⁴⁴ See generally David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

¹⁴⁵ See generally Stipanowich, *Punitive Damages*, *supra* note 1.

¹⁴⁶ As discussed below, the debate regarding construction arbitration has not centered on the fairness of arbitration to non-industry "outsiders" such as homeowners and small businesses. But then, there has always been a lack of focus on the special concerns of the residential market among construction attorneys, who practice primarily in the commercial, industrial and public procurement markets. See generally Stipanowich, *Rebuilding Construction Law*, *supra* note 11.

C. Reform at the AAA

The American Arbitration Association, the IBM of conflict resolution organizations, grew with the modern era of arbitration to shape arbitration theory and practice in a wide range of commercial venues.¹⁴⁷ After many years of hegemony in construction conflict resolution, its supremacy was challenged by a growing array of new providers and by the increasing tendency of parties to make their own arrangements for arbitration (even where the arbitration provision incorporated the AAA Rules). After years of seemingly incremental change (and nearly a decade after the ABA Forum's critical census), it was essential to take significant steps to improve user satisfaction.

In 1995, the AAA appointed a multidisciplinary task force to "undertake a comprehensive review of the AAA's Construction Dispute Avoidance, Management and Resolution Services," including its well-known arbitration program.¹⁴⁸ Among other things, the broad-based user

¹⁴⁷ The AAA is a non-profit organization headquartered in New York City. It offers a spectrum of conflict resolution services (including model rules, ADR administration, training, research and education) through a network of regional offices throughout the country. See Thomas J. Stipanowich, *On the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry*, in ADR AND THE LAW 65, 66-67 (1997) [hereinafter Stipanowich, *Cutting Edge*]. The AAA opened a total of 70,516 case files in 1996—a number which amounts to approximately one-third of the civil docket of the federal court system. Of these, 4,114 were construction-related filings. See Mark E. Appel & George H. Friedman, *Role of Arbitration and Mediation Under the American Arbitration Association's New Construction Industry Arbitration Rules*, AIA Contract Documents: Generation Next 1,2 (Oct. 23, 1997) (on file with author). Construction claims and counterclaims totaled \$927 million in 1996. See *id.* at 3.

¹⁴⁸ Stipanowich, *Cutting Edge*, *supra* note 147. See also Steven A. Arbittier, *The New and Improved Construction Industry Arbitration Rules*, 19 PUNCH LIST, Spring 1995, at 1; George H. Friedman, *Major Changes Coming to AAA Construction Arbitration*, 15 CONSTRUCTION LAW., Nov. 1995, at 25. The Task Force, which consisted of equal numbers of construction attorneys and non-attorney representatives of all of the major sectors of the construction industry (including institutional owners), conducted a number of meetings over the period of a year. I was the sole academic member.

The group's deliberations, while sometimes lively, did not involve the sometimes intense clash of perspectives which I have experienced in ADR rulemaking in securities arbitration, where the viewpoints of investors and brokers frequently conflict. The perspectives of AAA Task Force members were less a function of the broad agenda of contractors, owners or design professionals than a reflection of personal philosophy and experience. The ability of group members to achieve a high degree of consensus on the

group recommended sweeping changes to the AAA Construction Industry Arbitration Rules and construction arbitration panel—an overdue effort to address the widely varying needs of users and improve the quality of arbitration.

1. *Changing the Rules*

In reforming its Construction Industry Arbitration Rules, the AAA had to confront the continuing challenge of styling a system which would function effectively across a broad spectrum of conflict. The solution was a revamping of the Rules to present three clear alternative paths for cases of different sizes—a “default menu” of options which are effectuated in the absence of contrary agreement by parties.¹⁴⁹

Essentially in accordance with Task Force recommendations, the construction arbitration rules were modified to incorporate a “Fast Track” scheme for cases involving claims under fifty-thousand dollars; a “Standard Track” aimed at cases involving claims up to a million dollars; and a “Large and Complex Track” for cases involving more than a million dollars.¹⁵⁰ Each scheme represents a different prioritization of various process attributes. Fast Track procedures emphasize speed and simplicity: procedures include abbreviated timetables, limited extensions of time, expedited arbitrator appointment, limited information exchange and streamlined hearings.¹⁵¹

shape and substance of the Construction Industry Arbitration Rules suggests that some of the issues confronting the industry can be resolved by truly integrative solutions.

¹⁴⁹ See generally CONSTRUCTION INDUSTRY ARBITRATION RULES (American Arbitration Ass'n 1996). In the wake of recent revisions to the American Institute of Architects Contract Documents, see *infra* text accompanying notes 252–257, the Arbitration Rules were further revised and incorporated in the AMERICAN ARBITRATION ASS'N, CONSTRUCTION INDUSTRY DISPUTE RESOLUTION PROCEDURES (1997) [hereinafter AAA PROCEDURES].

¹⁵⁰ Although the Task Force recognized that the dollar value of claims is not a perfect surrogate for complexity, the experience of the AAA and Task Force members was that a greater amount in controversy often corresponded to a greater number of issues, or inherently difficult issues such as delay and disruption claims. See Stipanowich, *Cutting Edge*, *supra* note 147, at 68.

¹⁵¹ See AAA PROCEDURES, *supra* note 149, §§ F–1 to F–13. In cases in which no party's claim exceeds \$10,000 and no one requests an oral hearing, the option is “desk arbitration” (involving submission of documents alone). See *id.* § F–9.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

Standard Track procedures represent an updating of traditional arbitration procedures aimed at more competent arbitrators, clarified arbitrator authority and enhanced speed.¹⁵² Revisions to standard forms permit parties input regarding desired arbitrator qualifications. In a departure from long-standing tradition, the AAA eliminated the requirement of a free day of service, providing that arbitrators were to be compensated from the outset at the arbitrator's "stated rate of compensation."¹⁵³ Other reforms made more clear the arbitrator's authority to control discovery "consistent with the expedited nature of arbitration";¹⁵⁴ a more explicit statement of arbitral authority to control hearings¹⁵⁵ and to take interim protective measures, "including measures for the conservation of property."¹⁵⁶ The new rules also admonish arbitrators to provide a "concise, written breakdown of the award" and a "written explanation" if requested by all parties or if the arbitrator believes it to be appropriate.¹⁵⁷

Large and Complex Track procedures feature an elite panel of neutrals and special supplementary prehearing procedures, including arbitrator-

¹⁵² See Stipanowich, *Cutting Edge*, *supra* note 147, at 70-72.

¹⁵³ AAA PROCEDURES, *supra* note 149, § R-51.

¹⁵⁴ *Id.* § R-10.

¹⁵⁵ See *id.* §§ R-29, R-31. The procedures now make clear that an arbitrator may control the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony, direct the focus of the presentation, entertain dispositive motions, make preliminary rulings or request offers of proof. Although arbitrators could presumably do virtually all of these things under existing law, see IAN R. MACNEIL ET AL., III FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT chs. 32, 35 (1995 supp.) [hereinafter III MACNEIL ET AL.], a clear statement in the rules may be of great help in clarifying the matter for arbitrators and parties.

¹⁵⁶ AAA PROCEDURES, *supra* note 149, § R-34.

¹⁵⁷ *Id.* § R-42. The AAA did not, however, implement a Task Force proposal that the Demand and Answering Statement forms used by AAA be modified to permit parties to indicate their preference for a written explanation of the award. This is unfortunate, because unless the issue is specifically raised by arbitrators at a preliminary hearing, the choice cannot be brought to the parties' attention.

The Task Force might have taken the opportunity to clarify the authority of arbitrators to award attorney fees in appropriate cases, but did not. They thus failed to take account of the strong sentiment expressed by attorneys in the Forum survey. See *supra* text accompanying note 141.

supervised discovery;¹⁵⁸ they may be further tailored to the specific needs of the case by agreement of the parties.¹⁵⁹ The process commences with an administrative conference with an AAA officer to discuss the parties' needs, including views on arbitrator qualifications, and to consider the use of mediation or other nonadjudicative approaches.¹⁶⁰ A later "preliminary conference" is conducted by the arbitrators to discuss discovery and other preparations for arbitration and, once again, to explore the possibility of mediation and other alternatives.¹⁶¹ In addition to directing the production of documents, the rules make clear that arbitrators may order depositions or interrogatories for good cause and may place limits on discovery in accordance with the expedited nature of arbitration.¹⁶²

In all of these ways, the AAA sought to maximize the flexibility of its arbitration procedures and permit a tailoring of the process to the particular needs of different cases.¹⁶³ Ultimately, however, the best-crafted procedures mean little in comparison to the capabilities of arbitrators in whom so much discretion is placed.

¹⁵⁸ See *id.* §§ L-1 to L-6.

¹⁵⁹ See *id.* § L-1(a).

¹⁶⁰ See *id.* § L-2.

¹⁶¹ See *id.* § L-4.

¹⁶² See AAA PROCEDURES, *supra* note 149, § L-5.

¹⁶³ The AAA has also sought to take advantage of the possibilities inherent in the Internet and the World Wide Web. In a joint venture with other national organizations, the AAA is participating in an online dispute resolution program aimed at conflicts between users of online systems, system operators and others who allege harm due to wrongful online messages or postings. The program is among the first forays into what will likely become a burgeoning domain for conflict resolution in all commercial venues, including building design and construction. Applying online technology to arbitration and other forms of ADR is likely to enhance greatly the speed, economy and efficiency of conflict resolution in the twenty-first century. See *id.* at 94-95. See also George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695 (1997). The AAA has established website links to major construction industry organizations and has issued a computer diskette with information on construction ADR rules and procedures. See Appel & Friedman, *supra* note 147, at 6. These efforts parallel similar initiatives in some courts. See Weinstein, *supra* note 1, at 272-275.

Securities industry arbitration rules have also evolved to provide different procedures for cases of varying size and complexity. See, e.g., NATIONAL ASS'N OF SECURITIES DEALERS, INC., NASD CODE OF ARBITRATION PROCEDURE (1996).

2. *Improving the Pool of Neutrals*

The single most important step taken by the AAA was the substantial paring-down of its burgeoning national rosters of arbitrators and a heightening of standards in an attempt to enhance the quality of neutrals.¹⁶⁴ Because arbitration offers fewer procedural safeguards than trial, including more limited judicial review of the ultimate decision, and gives arbitrators more commensurate leeway throughout, the choice of arbitrators is critical. A system predicated on the finality of a judgment places a premium on respect for the judge; an approach which reposes significant discretion in the manager hinges on her managerial capabilities and innate good sense. In many respects, the arbitration process *is* the arbitrator. All too often, construction clients have complained of arbitrators' lack of understanding of pertinent issues and their inability to manage hearings.

The AAA looks to stricter experiential standards for panelists and enhanced training requirements to have an immediate effect on arbitrator quality. Hopefully, smaller pools of arbitrators will mean more appointments for each of those remaining. In addition, the rules now provide for compensation on the basis of each arbitrator's customary rates. Continuing arbitrator training and regular feedback and evaluation should also have an impact. Although it is too early to tell if the AAA's reforms will have a significant impact on public perception, there is no question that its ambitious program of change is a large step in the right direction.¹⁶⁵ Success depends, first and foremost, upon faithful execution by staff in the field.¹⁶⁶

¹⁶⁴ See Stipanowich, *Cutting Edge*, *supra* note 147, at 73-74.

¹⁶⁵ Early indications are that at least some aspects of the program have been successfully put into place. For example, in 1996, approximately 56% of the construction cases were subject to the "Fast Track" expedited arbitration rules. See Appel & Friedman, *supra* note 147, at 3. Early case statistics indicated that fast track cases were processed in an average of 49.5 days. See *id.* at 7.

As of July 1, 1997, the panel of construction arbitrators was reduced from a 1995 pool of 20,000 to approximately 4,000 members.

¹⁶⁶ Another key is the integration of the arbitration program with the larger conflict avoidance and resolution program. See *infra* Section III.E.

D. *The Broader Framework of Private Adjudication: Statutory Reform*

Modern arbitration statutes provide a general framework for the enforceability of private agreements to resolve conflicts by out-of-court adjudication. They are forceful recognition of the value of permitting people to structure their own varying paths to fairness, subject only to very limited procedural protections at the front and back ends of the process. For many years, there has been growing controversy over the need for statutory reform to clarify certain points, including issues of arbitrability and arbitral authority; the hottest debate of all involves enhanced judicial review of arbitration awards.¹⁶⁷

Currently, the National Conference of Commissioners on Uniform State Laws (NCCUSL) is redrafting revisions to the Uniform Arbitration Act (UAA),¹⁶⁸ the model upon which most state arbitration statutes are based. Although the Act was published more than forty years ago, it has never been modified. While the role of state arbitration law has been diminished sharply by preemptive judicial expansion of the Federal Arbitration Act (FAA),¹⁶⁹ state versions of the UAA are still cited as controlling authority on various arbitration issues (either properly or through ignorance of federal law). Moreover, it is thought by many that the current effort will be the precursor to reform of the FAA. Substantive issues on the table are virtually all significant in construction disputes; possible reforms range from a clarification of the division of responsibilities between courts and arbitrators respecting questions of arbitrability of

¹⁶⁷ Heating up the controversy is the expanding use of arbitration in all forms of standardized agreements. As court enforcement of arbitration agreements has reached broad new categories of transactional conflict, including investor/broker disputes, statutory employment discrimination claims and a host of consumer complaints (and, simultaneously, nonadjudicative processes such as mediation) have appeared on the scene, critics have increasingly compared arbitration unfavorably to the "total process" of court trial. See Stipanowich, *Punitive Damages*, *supra* note 1, at 7-9; Thomas J. Stipanowich, *The Growing Debate Over "Consumerized Arbitration": Adding Cole to the Fire*, DISP. RESOL. MAG., Summer 1997, at 20. As previously noted, the concerns of consumer/outsideers have not figured prominently in the approach of the construction sector (including institutional owners) and its legal representatives. See *supra* note 146; *infra* note 185.

¹⁶⁸ See UNIFORM ARBITRATION ACT, 7 U.L.A. 1 (1997).

¹⁶⁹ See Stipanowich, *Punitive Damages*, *supra* note 1, at 6-10.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

disputes to standards for judicial review.¹⁷⁰ The Drafting Committee will produce amendments addressing at least some of these issues. Generally speaking, the amendments will probably function as default rules subject to the contrary agreement of the parties.

Yet again, rulemakers are confronted with the tension between the traditional policies associated with arbitration, including “party autonomy, speed, lower cost, efficiency, and finality,” and concerns over the enhanced fallibility associated with abbreviated process.¹⁷¹ Here, however, the field of concern is the judicial role in the entire spectrum of domestic arbitration agreements, and the drafter paints with the broadest of brushes.

As Academic Advisor to the Drafting Committee, I queried the membership of the American College of Construction Lawyers (a group of approximately 100 prominent construction specialists) and several dozen members of steering committees of the ABA Forum on the Construction Industry regarding possible statutory reforms. These individuals were asked whether various possible reforms were “essential,” “appropriate,” “unnecessary” or “a bad idea.” The seventy-three responses reflected a considerable variance in attitudes toward statutory reform¹⁷² and the ever-

¹⁷⁰ Other possible reforms identified by the NCCUSL Study Committee include:

- (1) express recognition of the judicially well-recognized doctrine of quasi-judicial immunity of arbitrators;
- (2) a provision authorizing judicial consolidation of arbitration hearings in cases involving common parties, evidence or facts;
- (3) specific provisions governing the disclosure obligations of arbitrators and the consequences of nondisclosure;
- (4) express recognition of the authority to hold prehearing conferences;
- (5) express recognition of the authority of arbitrators to order and supervise limited discovery;
- (6) a provision authorizing interlocutory review of arbitral preaward orders (a particularly questionable proposition in light of the arbitral goals of speed and efficiency);
- (7) express recognition of the authority of arbitrators to render provisional or interim awards;
- (8) a provision authorizing arbitrators to award attorney fees in appropriate cases;
- (9) a provision recognizing the authority of arbitrators to award punitive damages, and, possibly, further provisions addressing that issue.

¹⁷¹ Cf. H.L.A. HART, *THE CONCEPT OF LAW* 139–144 (1961).

¹⁷² See Memorandum from Thomas J. Stipanowich to the NCCUSL Drafting Committee for Reform of the Uniform Arbitration Act 8–10 (on file with author) [hereinafter NCCUSL Memo]. Simultaneously, a survey was taken of members of various subdivisions of the American Bar Association Litigation Section regarding

present tension between the "Commercial Moot" and "Total Process" models.

For example, nearly four of five responding construction specialists supported a statutory amendment defining the respective responsibilities of courts and arbitrators regarding the determination of whether issues are to be arbitrated. In fact, more than a quarter viewed such a term as "essential." A similar percentage favored express statutory recognition of quasi-judicial immunity for arbitrators.¹⁷³ Various majorities registered support for statutory provisions giving courts authority to consolidate arbitration hearings¹⁷⁴ and acknowledging the authority of arbitrators to conduct prehearing conferences,¹⁷⁵ direct and supervise discovery¹⁷⁶ and grant interim relief¹⁷⁷ and attorney fees.¹⁷⁸

possible reforms to the Uniform Act. The 319 respondents, while a small percentage of the total membership of the subdivisions surveyed, reflect a fair cross section of the Section's membership. Thirty-five percent identified their primary area of practice as commercial litigation, twenty-five percent construction and eighteen percent employment law. Smaller numbers represented labor, securities, ADR and other specialties. Almost one-third (32%) had participated in more than twenty-five completed arbitrations; nearly three-quarters of the group had arbitrated to final award more than ten times. See Thomas J. Stipanowich, A Snapshot of Responses to the Litigation Section 1997 Arbitration Survey 1 (1997) (on file with author) [hereinafter Stipanowich, Snapshot]. Respondents conveyed opinions regarding what methods, if any, were appropriate to address various arbitration issues, statutory reform, private agreement or standard arbitration rules. Like the other respondents, their answers reflected a wide range of opinion which varied considerably by issue. See generally *id.*

¹⁷³ See NCUSL Memo, *supra* note 172, at 1 n.1, 2. Eighteen respondents (25%) viewed such a provision as "essential." See *id.* at 8.

¹⁷⁴ See *id.* at 2. More than four out of five construction attorneys favored a statutory provision; about 25% viewed the provision as "essential". See *id.* Whatever statutory reforms occur with regard to multiparty practice, however, are unlikely to undo a significant shortcoming of construction arbitration under the American Institute of Architects contract scheme—the prohibition on multiparty arbitration absent post-dispute written agreement by all parties. See AIA A201, *supra* note 112, § 4.3.10.1. This long-standing exculpatory scheme by the AIA disserves owner-clients by saddling them with the potential burden of multiple proceedings to resolve a single multiparty dispute. In the face of such specific anticonsolidation terms, however, courts must honor the expressed intent of the parties and forbear from ordering consolidation unless the parties agree otherwise.

¹⁷⁵ See NCCUSL Memo, *supra* note 172, at 3. Seven of ten construction attorneys were positive regarding statutory reform; roughly 29% viewed such a provision as "essential." See *id.* While 31% of Litigation Section respondents desired express statutory recognition of the authority of arbitrators to conduct prehearing conferences, a

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

The Commercial Moot model was implicit in some other responses. Most construction practitioners were unsupportive of a statutory provision authorizing punitive awards¹⁷⁹ and overwhelmingly rejected the notion that pre-award orders by arbitrators (such as orders dealing with document production, disclosures, scheduling and the like) should be reviewable on an interlocutory basis by courts.¹⁸⁰

Construction practitioners were almost evenly split on the appropriateness of a provision recognizing the ability of parties to agree to more extensive judicial review. They tended to be less supportive of a

far greater number (62%) preferred to leave the matter to private agreement or to incorporate arbitration rules. *See id.*

¹⁷⁶ *See id.* at 3. More than three-quarters of responding construction specialists were positive toward a statutory provision recognizing the authority of arbitrators to order limited discovery, although only about 29% viewed the provision as "essential". At the same time, there was strong resistance to the concept of identifying specific limits (such as permitting document discovery only in the absence of a specific agreement). *See id.*

Although nearly all Litigation Section respondents favored granting arbitrators some authority to order and supervise prehearing discovery, the response was mixed on the proper method for addressing the matter. Forty-nine percent of those responding favored some form of statutory treatment of the issue. *See id.*

¹⁷⁷ *See id.* at 4. Only seven of the responding construction practitioners deemed it "essential" to have a statutory provision addressing the authority of arbitrators to render interim relief, although about 70% of those responding thought it "appropriate." *See id.*

¹⁷⁸ *See id.* Among construction practitioners, 16% thought a specific provision authorizing arbitral awards of attorney fees was essential; another 45% thought it "appropriate". Forty-six percent of Litigation Section respondents favored express statutory treatment; 49% preferred to leave it to private agreements or rules. Fewer than half of the latter favored giving arbitrators authority to award attorney fees "under circumstances comparable to F.R.C.P. 11." *Id.*

¹⁷⁹ *See id.* Fifty-five percent of responding construction lawyers thought it a "bad idea," and another 10% viewed it as "unnecessary." On the other hand, 58% of Litigation Section respondents favored some statutory treatment of arbitral awards of punitive damages. Twenty-nine percent wished to leave the matter solely to private agreement or incorporated rules. *See id.*

¹⁸⁰ *See id.* at 5. Eighty-three percent of construction practitioners viewed statutory authorization of interlocutory review as "unnecessary" or a "bad idea." Eighty percent of Litigation Section respondents said "No." More than half of the latter (53%) preferred to leave statutory provisions governing judicial review of arbitration awards as they are, while 38% supported some form of change. *See id.*

provision setting forth specific guidelines for review pursuant to such agreements.¹⁸¹

The response of leading construction attorneys lends few clear messages for drafters, aside from their visceral rejection of the concept of interlocutory review. In no case did as many as a third of practitioners describe a possible reform as "essential." A strong note of caution, however, was sounded in the comments proffered by many who feared that overzealousness in imposing universal due process requirements for arbitration would undercut the essential elements which make arbitration a true alternative. As one Birmingham attorney lamented:

The "golden goose" is about to be killed. As is so often true, it is being killed by lawyers, in some cases those who use arbitration. If one wants (i) procedures in detail, (ii) discovery, [and] (iii) judicial review, [one can] go to the court house. If one wants to set the rules by contract, to have a limit to procedures and a . . . [more expeditious] result, let's stick with arbitration as it was. We are now generally recommending against . . . [arbitration under the rules of a major provider] because it is becoming [a] courthouse in disguise. We need quality arbitrators, not rules and procedures.¹⁸²

This, recall, is a lawyer speaking. His comments and others underscored widespread concerns even among lawyers regarding over-legalism and restricted flexibility in the structuring of private arbitration agreements.¹⁸³ Consistent with the longstanding concerns of users and the

¹⁸¹ See *id.* at 5-6. Forty of seventy responding construction attorneys thought the latter "unnecessary" or a "bad idea." See *id.* at 6.

Seventy-four percent of Litigation Section respondents were against a statutory provision supporting judicial review for errors of fact. The group was fairly evenly split regarding the appropriateness of a statutory provision supporting judicial review for errors of law (44% yes, 48% no). This split extended to review of punitive awards (48% yes, 40% no). See *id.* at 5.

On the other hand, 67% favored a statutory provision explicitly permitting parties to contractually provide for judicial review of awards. However, the group was significantly less supportive of a "predispute exercise of an option for a standard-limited single level judicial review of the legal and factual basis of the award" (27% yes, 50% no). See *id.*

¹⁸² See *id.* at 6.

¹⁸³ A few examples illustrate the general tenor of comments by construction specialists:

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

mixed response of the bar, great care must be taken to balance the perceived need for a specific reform against the potential costs to parties, arbitrators, administrators and courts. This is especially so because, in the usual case, an arbitration agreement and incorporated arbitration rules (like the AAA Construction Industry Arbitration Rules) fill the broad gaps left by the statute.¹⁸⁴ In the case of the AAA Construction Industry Arbitration Rules, as we have seen, this task has been performed with care to enhance procedural flexibility and tailor procedures to the widest possible range of circumstances. From the perspective of the construction industry and its legal advisors, therefore, proponents of reform must bear a heavy burden to demonstrate the necessity of system-wide change in the structure of a conflict resolution mechanism that is built upon notions such as efficiency, flexibility and party autonomy.¹⁸⁵

Arbitration is not litigation. Injecting litigation procedures like broad judicial review will make arbitration less attractive as an alternative dispute resolution process. Good arbitrators can handle the legal issues just fine. (Seattle attorney.)

Attempting to cross-breed [arbitration and litigation,] . . . two entirely different forms of dispute resolution [,] will defeat the whole purpose. By definition, arbitration is alternative dispute resolution—alternative to the court system, not a watered-down semi-court system. (Dallas attorney.)

(1) Arbitration is a contractual agreement, and the UAA should not be encumbered with obvious contractual options (such as [proposals regarding review of award]) . . . (2) The UAA should not mandate quasi-litigation procedures and techniques. If discovery is appropriate, leave its scope to the discretion of the arbitrator. I know of no empirical evidence that discovery is being abused in arbitration. (Minneapolis attorney.)

The theme of all the changes is to make the process more legalistic and friendly to lawyers. The changes help lawyers try more polished and costly cases—they are not designed to help clients much at all. My contractor clients would hate the changes—their attorneys would like them. (Portland, Maine attorney.)

Id. at 7 n.4.

¹⁸⁴ We might heed the lessons of the securities industry, in which binding arbitration is heavily regulated: as more than one veteran of securities arbitration reform has observed, in this of all contexts one must not lose sight of the virtue of simplicity. See Robert S. Clemente & Karen Kupersmith, *Grabbing the Bull by the Horns*, BUS. L. TODAY, May–June 1997, at 18 (concluding that securities industry arbitration has developed all of the negative features of litigation); Memorandum from William J. Fitzpatrick to Members of the Securities Industry Conference on Arbitration (Nov. 5, 1996) (on file with the author).

¹⁸⁵ But what of consumers as signatories to standardized agreements, whose concerns provided great impetus for the current effort? Their concerns, while beyond the scope of this paper, are not insignificant. And while not championed by the

E. Current Challenges: Arbitration in the Larger ADR Scheme

Binding arbitration, long the mainstay of construction dispute resolution, will probably remain the preferred alternative to litigation for many when settlement efforts fail. Particularly for disputes which do not involve more than a few hundred thousand dollars, arbitration before a competent tribunal is likely to result in a less costly, more timely and more informed decision than trial before a judge or jury.¹⁸⁶ The expansion of arbitration processes to accommodate virtually the full spectrum of civil

construction bar, there may be owners of new or improved homes who, like other recipients of household goods and services, find themselves in an agreement to arbitrate with terms of questionable fairness.

Although the general public may be benefited by a number of the proposed reforms to the Uniform Arbitration Act, it remains to be seen whether the revised UAA will address legitimate concerns regarding consent and due process issues associated with boilerplate arbitration agreements in consumer contracts.

In this regard, Litigation Section members were asked whether arbitration statutes should specify certain minimum formal requirements for enforceability of arbitration agreements, including (1) conspicuousness requirements; (2) a statement of differences between arbitration and litigation and (3) separating, signing or initialing requirements. Seventy-two percent of those responding favored a statutory requirement that arbitration agreements be conspicuous, although more than half of these respondents would limit the requirement to "consumer" contracts. There was significantly less support for other kinds of formal requirements; the separate signing requirement was disfavored by 52% of those responding. *See* Stipanowich, Snapshot, *supra* note 172, at 2.

NCCUSL is not known for risking the defeat of legislation by taking strong stands on behalf of consumers; controversies surrounding recent efforts to strengthen consumer provisions in the Uniform Commercial Code reflect the difficulty of producing strong consumer legislation in this body.

In any event, there are other efforts afoot to address consumer concerns. This author is Academic Reporter for a National Consumer Due Process Advisory Committee assembled under the auspices of the American Arbitration Association and co-chaired by former California appellate court judge Winslow Christian and consumer advocate William Miller. The group's membership consists of individuals affiliated with leading national consumer groups and national providers of consumer goods and services. The group is developing a Consumer Due Process Protocol setting forth a set of standards for ADR agreements in consumer contracts. It is hoped that the standards will provide a source of information regarding the reasonable expectations of consumers that provide some guidance to courts in the enforcement of standardized agreements. *See* Protocol for Arbitration and Mediation of Consumer Disputes (forthcoming 1998) (on file with author); *cf.* *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

¹⁸⁶ *See* Stipanowich, *Rethinking Arbitration*, *supra* note 73, at 460-462.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

controversy has, however, recharged the ongoing debate over the adequacy of existing arbitration procedures as a "surrogate" for the court system. Perhaps for the same reasons, arbitration is now subject to many of the same criticisms heaped upon litigation.¹⁸⁷ Today, fairly or unfairly, many see only the problems and not the promise of binding arbitration.¹⁸⁸ Thus, the coming years will remain a time of unprecedented challenge.

Arbitrators must confront many of the same issues regarding professionalism which fuel debates among mediators.¹⁸⁹ While the days of Cincinnatus-pulled-from-the-plow may not be over, there is no question

¹⁸⁷ The trend toward adversary legalism in American commercial arbitration is paralleled by the observed "Americanization" of international commercial arbitration, a field increasingly dominated by the strategies and styles of litigators from major U.S. firms. Cf. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 34 (1994) (discussing transformation of state workers compensation program from informal, inexpensive process into "an intensely adversarial and legalistic system"). See generally Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27 (1995).

Recently, two careful observers of conflict resolution trends in the British construction industry reported:

It was to avoid the notorious deficiencies of the court system (delay, cost, procedural technicality and generation of antagonism) that arbitration became adopted widely, but evidence has existed for some years that arbitration has been falling into disrepute, as it is seen to suffer from similar deficiencies. . . . Th[e] imitation of legal procedures [in arbitration] has been described as the 'juridification' of arbitration. . . . Lawyers have been accused of hijacking the arbitration process, most obviously to protect their own position and authority. . . . Arbitration, instead of being an alternative to litigation . . . is regarded as part of the problem.

Brooker & Lavers, *supra* note 111, at 520.

¹⁸⁸ For some attorneys, the advantages of a quick and final settlement were perceived as less significant than the price paid in terms of "enhanced fallibility" or, seen another way, a loss of control. Yet the resulting reforms aimed at making arbitration more like litigation carry a price of their own. In recent years, I have heard persons inside and outside the ranks of the legal profession insist that in discussions of emerging alternative dispute resolution approaches, arbitration should be lumped with litigation as a process to be avoided through resort to other mechanisms. See JOHNSON & HIGGINS, *RISK MANAGEMENT STUDY OF LARGE DESIGN FIRMS 10* (1996) [hereinafter *RISK MANAGEMENT STUDY*] (noting preference of large design firms for dispute resolution methods other than arbitration).

¹⁸⁹ See e.g., Wade Lambert, *Calls Increase for Guidelines for Mediation*, WALL ST. J., Oct. 22, 1993, at B1..

that modern commercial arbitration places many demands on arbitrators. Given the wide discretion they are granted and the relative finality accorded their determinations, arbitrators must possess a high degree of integrity, a judicial mindset, considerable process sophistication and a willingness to take firm action when necessary (as in the handling of dispositive motions, redundant testimony and delay tactics). It is time to look more closely at the model of the full-time professional arbitrator and the framework necessary to insure maintenance of professional standards, including ethical norms.¹⁹⁰

Moreover, arbitration cannot and should not stand alone. The very policies supporting the use of the process in contractual relationships—economy, efficiency, privacy and getting on with business—augur in favor of avoiding an adjudicated result wherever possible. Leading court ADR programs feature mechanisms to advise parties and encourage reflection upon alternative intervention strategies to meet the needs of disputing parties. Court adjudication is treated as just another form of problem solving—one, to be sure, of unique importance to society—but certainly not an approach of broad utility for commercial relationships and, potentially, the costliest in financial and human terms.¹⁹¹ It is, appropriately, the final step in what is increasingly a deliberate, layered process.¹⁹²

Recognition of the need for a midpoint in the passage from face-to-face negotiation to binding arbitration—an interim stocktaking to permit deliberation, reflection, discussion and resolution—inspired the traditional

¹⁹⁰ Although cost concerns and the desire for the continued involvement of active businesspersons may limit the use of professional neutrals in arbitration, they might be effectively used in appropriate settings—for example, as chair of a three member panel in a major construction case.

¹⁹¹ Cf. Brooker & Lavers, *supra* note 111, at 523 (commenting on English research concluding that arbitration often contributes to alienation between parties and affects future relationships).

¹⁹² Moreover, the importance of “settlement events”—points in the process at which attorneys have to open the case file and make decisions—in promoting settlement of cases is widely appreciated. See Stempel, *supra* note 1, at 354 (noting comments of panelists). One little-noted irony of binding arbitration is that the relative absence of prehearing “events” has contributed to the reality that a relatively high percentage of cases in which an arbitration demand is filed actually go to a hearing on the merits. For example, recent figures compiled by the NASD Regulation, Inc., the regulatory arm of the National Association of Securities Dealers (NASD), indicate that in 1996, 33% of the cases that closed were resolved by arbitrator decision. See NASD Regulation, Inc., All Arbitration Close Cases Classified by Why the Case was Closed (Nov. 11, 1997) (on file with author).

first-tier determination by the project design professional.¹⁹³ More recently, it prompted AAA rulemakers to encourage resort to mediated negotiations prior to arbitration—an option which was exercised with increasing frequency in recent years,¹⁹⁴ potentially reinforcing and facilitating interest-based problem solving.¹⁹⁵ Whatever flexibility is produced within the ambit of binding arbitration—and, within current AAA procedures, there appears to be a good deal—arbitration is only one among a growing number of “doors” for consensual conflict resolution.

IV. RETROFITTING OF MEDIATION AND OTHER INTERVENTION TECHNIQUES

A. *Toward Informality and Flexibility*

In the past half-decade, the environment of conflict resolution in the construction industry has undergone dramatic change. The 1990s have seen unprecedented movement toward the use of intervention procedures aimed at furthering settlement prospects through interest-based bargaining and low cost third-party perspectives on rights and power dynamics; the movement was fueled largely by widespread frustration with the perceived limitations and the costliness of traditional alternatives.¹⁹⁶ The trend in private contractual arrangements has been reinforced by recent developments in federal and state courts and administrative agencies and by industry work groups and studies here and abroad.¹⁹⁷ As in the case of developments in binding arbitration, the evolution of third-party interventions aimed at settlement reflects the struggle of competing philosophies.

¹⁹³ See *supra* text accompanying notes 95–96 and *infra* text accompanying notes 198–203.

¹⁹⁴ See Appel & Friedman, *supra* note 147, at 3–4 (noting gradual growth in use of mediation in construction cases under AAA auspices, including “arbitrations converted to mediations”).

¹⁹⁵ Cf. URY ET AL., *supra* note 14, at 32.

¹⁹⁶ See generally Stipanowich, *Beyond Arbitration*, *supra* note 2.

¹⁹⁷ See generally *id.* See also Philip J. Richter & Ramzi G. Saaty, National Construction and Building Goals: An Industry Sector Perspective—Industrial, White House—Construction Industry Workshop National Construction Goals White Paper 15–17 (1995) (on file with author).

B. *The "Engineered Solution": Standing Neutrals, Dispute Review Boards and Other Evaluative Approaches*

The custom of referring construction project disputes to the design professional responsible for planning the project dates back to mid-nineteenth century England, during the period of massive canal-building projects.¹⁹⁸ The project engineer, a professional of considerable status, was apparently accepted as a judge by both parties. The same arrangement appeared in the United States during the railroad boom of the 1870s and 1880s and survived in state roadbuilding projects (where disputes were judged by the state engineer subject to very limited review).¹⁹⁹ Vestiges still remain, most notably in New York City.²⁰⁰

More commonly, the design professional, or A/E, is assigned the responsibility of rendering an interim decision which, if unacceptable to either party, is subject to further claims process.²⁰¹ Today, the rationale for making the project architect or engineer a judge—albeit a first-tier judge subject to *de novo* review—is efficiency. For quick and informed determinations regarding questions of contract interpretation and related claims and controversies, it is reasoned, the logical source is the design professional responsible for drafting the documents. Even if non-binding, the architect's or engineer's decisions may encourage abandonment of claims or establish grounds for settlement. Most significant, however, is the prospect that the A/E may propose practical solutions to the problem at hand.

¹⁹⁸ See JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 38–39 (1997).

¹⁹⁹ See *id.* at 39.

²⁰⁰ See, e.g., *Westinghouse Elec. Corp. v. New York City Transit Auth.*, 623 N.E.2d 531 (N.Y. 1993); Robert MacPherson, *In Your Face ADR: New York City's Construction Contract Dispute Procedure*, 25 PUB. CONT. L.J. 301, 302–311 (1996). The practice of conferring contractual authority to render final and binding decisions on the owner's design professional is inconsistent with the fundamental principal that no party should judge its own case. See generally III MACNEIL ET AL., *supra* note 155, § 28.2.5.2. Respondents to a recent multidisciplinary survey conducted by the Associated General Contractors, Inc. and DPIC, Inc., including design professionals, strongly supported the notion that A/E decisions should not be final and binding unless the parties agree after the dispute has arisen. See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 165. Most design professionals, however, thought they should have final decisionmaking authority over disputes involving aesthetic questions. See *id.*

²⁰¹ The concept is embodied in the nation's leading standard form construction contract. See AIA A201, *supra* note 112, § 4.2.12.

But the practice of conferring judicial authority—even limited, first-tier authority—has come under increasing fire. How, ask contractors' advocates, can an architect or engineer whose fee—or livelihood—depends upon the owner, exercise independent judgment when the owner is a party? And in the all-too-likely event that the design professional's own work is at issue, shouldn't she be disqualified as a *de facto* party? Europeans have never understood this Anglo-American custom; indeed, the issue raises conflicts in international agreements.²⁰² As all parties have become more sensitive to cost and more concerned regarding the disposition of legal rights and remedies, the quasi-adjudicatory role of the design professional has been assailed from all sides. Viewed by many as a hopeless conflict of interest in light of the design professional's concurrent role as agent of the owner, and, even worse, a *de facto* party to many jobsite disputes, the A/E's determination is sometimes nothing more than a meaningless charade which contributes little to the prospect of settlement and merely postpones arbitration.²⁰³

Today, support for the first-tier adjudicative role is mixed. Responding to a recent survey by the Associated General Contractors, Inc. (AGC), nearly half of those who answered the question agreed that A/Es "should not play an adjudicative role with respect to any owner-contractor disputes," although there is still evidence that many contractors as well as designers still support the traditional approach of initial referral to the design professional with a reservation of the right to arbitrate.²⁰⁴

²⁰² See SWEET, *supra* note 198, at 39, 131.

²⁰³ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 74–75. The process has strong advocates, however. Architect William Reiner, an active participant in American Institute of Architects drafting as well as the AAA Task Force on Construction Conflict Resolution, insists that the interim-decision system works because "[t]he Architect's interpretations and decision . . . must be consistent and reasonably inferable from the Contract Documents and must be rendered *without partiality*." William B. Reiner, *Construction Claims and Disputes*, AIA Contract Documents: Generation Next 279 (Oct. 23, 1997). Reiner continues:

An Architect soon develops the reputation for either being fair and highly principled or unfair and Owner-bias[ed]. The ethical Architect and his/her clients will enjoy sharp competitive bidding, fair pricing and a minimum of claims. The Architect with the latter type [of] reputation will be rewarded with inflated pricing to compensate for anticipated hassles and a plethora of claims and disputes.

Id.

²⁰⁴ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 165.

To the engineer, however, the world remains a series of problems to be solved through rational application of scientific principles. Who better, by predisposition and training, to fashion true and lasting solutions than the engineer—systematic, rational-minded, and schooled in applied physics and higher mathematics? By the 1980s, thanks, in the engineers' view, to "outside influences"—namely lawyers and claims consultants—construction industry conflict resolution was totally out of control.²⁰⁵ More and more, design and building was driven by claims, controversy, legal process and the threat of process. Here, front and center, was a problem on the grand scale just begging for an "engineered solution."

So, what to do? The rational approach was to structure a problem-solving system which would reduce or eliminate the role of "outsiders" and put engineers and other principal players back in control of the process. The logical starting point was an early expert evaluation of the issue, timed to resolve conflict before positions harden, memories wane and parties resort to outside help. The only problem was that the traditional embodiment of this concept—"first tier" adjudication by the project design professional—had been discredited in many eyes due to perceived conflict of interest.

But if the owner's own engineer or architect was disqualified from the evaluative role, what about a "standing neutral"—a third-party expert? The latter would, of course, be a professional engineer or other uninterested person of proven construction experience who could competently evaluate the bona fides of a claim for additional work, allegations of delay or unforeseen conditions, and thus encourage the dropping or settling of the claim. Better yet, the neutral could be brought on board at the beginning of construction and familiarized with the job and its primary participants—primed to hit the ground running at the first hint of controversy. Better still, if it could be economically justified, would be to provide for a standing panel blending several expert perspectives (primarily, if not entirely, *non-legal* perspectives).

Thus, it came to be that a growing number of public and private projects, particularly large engineered jobs such as tunnels, roads, bridges and process plants, employed standing neutrals or dispute review boards for the purpose of rendering summary opinions on project claims and

²⁰⁵ Cf. Brooker & Lavers, *supra* note 111, at 525 (showing that in an extensive survey of construction industry in United Kingdom, over half of respondents expressed concern over lawyer control of conflict resolution and desired processes which would reduce or eliminate the role of lawyers).

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

controversies at or shortly after their genesis.²⁰⁶ Proponents claim such processes have proven extremely successful in preventing lingering and proliferating job disputes which can have disastrous consequences for progress and productivity.²⁰⁷ They also suggest that the mere presence of a readily available expert tribunal strongly discourages frivolous claims or defenses and results in early settlement or abandonment of claims.²⁰⁸

The ultimate proving ground for the dispute review board concept will be the nation's most ambitious project, the Boston Central Artery/Tunnel Project, better known regionally as the "Big Dig."²⁰⁹ The contractual framework for this ten-to-fifteen year, multi-billion-dollar megaproject was largely claims-driven: the planners anticipated between ten and twenty thousand disputes under more than seventy-five interrelated construction contracts (as well as design, insurance, eminent domain and workers' compensation disputes).²¹⁰ Under the circumstances, snowballing claims

²⁰⁶ See TECHNICAL COMMITTEE ON CONTRACTING PRACTICES OF THE UNDERGROUND TECHNOLOGY RESEARCH COUNCIL, AVOIDING AND RESOLVING DISPUTES DURING CONSTRUCTION: SUCCESSFUL PRACTICES AND GUIDELINES 14 (1991) [hereinafter AVOIDING AND RESOLVING DISPUTES]; see also Stipanowich, *Beyond Arbitration*, supra note 2, at 125-126; John R. Kohnke, *Dispute Review Boards*, in ADR: A PRACTICAL GUIDE TO RESOLVE CONSTRUCTION DISPUTES 267 (Alan E. Harris et al. eds., 1994) [hereinafter ADR: A PRACTICAL GUIDE]; Lawrence D. Harrod, *Preventing Disputes with DRBs: Atlanta's Clayton Improvement Project*, 20 PUNCH LIST, Summer 1997, at 1; Charles Molineaux, *Views of a DRB Expert*, 20 PUNCH LIST, Spring 1997, at 1; Michael C. Vorster, *Dispute Review Boards as an ADR Technique*, in *Charting the Course to the Year 2000-Together!* (Oct. 18, 1994) (on file with author); James P. Groton & William R. Wildman, *The Role of Job-Site Dispute Resolution in Improving the Chances for Success on a Construction Project*, 12 CONSTRUCTION LAW., Aug. 1992, at 1.

²⁰⁷ See Harrod, supra note 206, at 4-5.

²⁰⁸ According to a construction manager on Atlanta's Clayton Improvement Project, "cooperation was heightened during DRB meetings" because "neither party wanted to appear foolish or intransigent before th[e] panel of experts." Harrod, supra note 206, at 5. See also AVOIDING AND RESOLVING DISPUTES, supra note 206, at 7 ("There is an obvious desire to not appear uncooperative or foolish in front of the Board.") But see Richard F. Smith et al., *Dysfunctional ADR: Tips to Avoid the Pain*, 16 CONSTRUCTION LAW., Oct. 1996, at 29-30 (describing potential problems with DRBs, as where panel is not fairly balanced in membership).

²⁰⁹ See Anthony E. Battelle, *The Growing Impact of AD[R] on the Construction Industry: "Real Time" Dispute Processing on the Boston Central Artery/Tunnel Project*, 15 CONSTRUCTION LAW., Nov. 1995, at 13.

²¹⁰ See *id.*

could quickly overwhelm the economic and human resources of the public authority—controversy needed to be carefully managed and, effectively, nipped in the bud.

After much deliberation, project planners settled upon a custom-designed contractual conflict resolution system which included several tiers of pre-litigation “filters”: negotiations by project staff, followed by negotiations at a higher level of management, then a nonbinding determination on the merits by the state’s authorized representative and, finally, a dispute review board. The typical Artery/Tunnel contract calls for a Dispute Review Board (DRB) made up of two neutral technical panelists specialists, and a panel chair with “significant dispute resolution experience,” perhaps, but not necessarily, a lawyer.²¹¹ Panelists are appointed at project startup, permitting them to become familiar with project personnel, technical aspects and progress. DRB operating rules minimize formality and “eliminate all vestiges of legal hearing process” such as lawyer argument and examination of witnesses while maximizing the flexibility of the panel to control the gathering of information.²¹² At the conclusion of the inquisitorial process, the panel deliberates and produces a recommendation, complete with supporting rationale, for the project director.

In setting up the DRB, process designers sought a “real time” dispute resolution system which requires parties to “assess their positions and work out their strategies before knowing whether the contract is going to end up in a profit, loss, or break-even situation” while facts are still fresh, witnesses are still available and legal bills are minimized.²¹³

All indications are that the Artery/Tunnel scheme has worked well so far. Moreover, at least during the early years of construction, the much-vaunted prophylactic effect of an *in situ* panel appears to have carried over into the Artery/Tunnel. With more than twenty percent of construction complete, and more than 1,500 claims processed, only a handful reached the DRB,²¹⁴ and none have gone to court.

The concept of early neutral evaluation (at least, models involving industry experts) has broad appeal not only among design professionals, but

²¹¹ The Artery/Tunnel planners acknowledged that DRBs often exclude attorneys as panelists, but concluded that construction lawyers skilled in informal conflict resolution might add value to the DRB. *See id.* at 15.

²¹² *See id.* at 16.

²¹³ *See id.*

²¹⁴ *See id.* at 14.

among construction contractors as well. This was the clear message of recent industry-wide surveys co-sponsored by the Associated General Contractors (AGC) and DPIC, a leading insurer of design professionals. Despite having little experience with the process, industry actors generally ranked the approach higher than mediation, the better-publicized favorite of attorneys.²¹⁵ Indeed, implicit in this choice is a rejection of the legal system and the strategies of legal professionals—a recurrent theme in treatments of DRB processes.²¹⁶

Variants of early neutral evaluation also have significant support overseas. In recent years, British and international construction contracts have incorporated the role of interim adjudicator to render temporary decisions on payment matters and other disputes.²¹⁷ Under the JCT 81, for example, the adjudicator can address adjustments in the contract sum, render interpretations of the contract and make determinations of entitlements to time extensions or damages. In this role the adjudicator acts “as an expert and not an arbitrator.” The adjudicator’s determination is final and binding on the parties unless referred to arbitration.²¹⁸

²¹⁵ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 145–154, 179 (noting that attorneys perceived mediation as the most effective approach for achieving a wide variety of goals, while design professionals and contractors tended to evaluate early neutral evaluation more highly); see also RISK MANAGEMENT STUDY, *supra* note 188, at 9–10 (noting that among 200 large design firms responding to survey, preferred method of dispute resolution is early neutral evaluation).

²¹⁶ See, e.g., AVOIDING AND RESOLVING DISPUTES, *supra* note 206, at 15. A candid perspective on the anti-lawyer sentiments comes from Robert J. Smith, a well-known Madison, Wisconsin construction attorney who stresses that he is also a civil engineer “who advises clients and, as engineers do, tries to solve problems.” Molineaux, *supra* note 206, at 5. Smith, a major DRB advocate, acknowledged the “visceral distaste” most “construction people” share for lawyers:

Lawyers are the professionals everyone loves to hate so there is a serious edge to lawyer jokes. Like most people, engineers don’t particularly like being cross-examined and challenged and, on top of that, they see the legal procedures standing in the way of getting to a resolution. . . . Most DRB people would find [the active participation of lawyer advocates] abhorrent.

Id.

²¹⁷ See generally Bruce Bentley, *Adjudication Procedures: A Temporary Diversion?*, in FENN & GAMESON, *supra* note 65, at 187.

²¹⁸ The precise legal effect of this provision has apparently been modified by recent legislation in the United Kingdom, including a law making “adjudication” mandatory in construction contracts. See generally Phillip Capper, *Arbitration and*

The Institution of Civil Engineers (ICE) New Engineering Contract provides for the identification of an adjudicator who is an officer of the Authority associated with the letting or managing of the Contract—a throwback to traditional approaches.²¹⁹ In this role the adjudicator reviews actions of the owner's project manager or supervisor and may overrule the former and order payment of damages or a correction of time. Again, the adjudicator acts as an expert and not as an arbitrator; again, his determination may be appealed to arbitration by either party.²²⁰

As with "engineered" approaches in the U.S., such procedures are intended to provide "rough and ready" determinations of rights without the formalities of trial, and by the vehicle of an ever-present honest broker to discourage frivolous positions and encourage realistic settlements short of legal process.

C. *The Multiple Modes of "Mediation"*

1. *A Good Idea From the Court System*

For all the efforts of engineers to foster the culture of the DRB, it appears that, in this as in other settings, trend-setting honors must go to that increasingly ubiquitous alternative, mediation.²²¹ The much-heralded recent unveiling of a mediation provision as the jewel in the crown of the 1997 American Institute of Architects (A.I.A.) contract documents²²² represents yet another high water mark for a movement which swept courthouses and communities across the country. Its ubiquity reflects the universality of its attraction as a uniquely flexible, portable and facilitative approach to negotiations at any time during or after the emergence of conflict. Properly conducted, mediation entails few risks and great prospective benefits which may transcend the legal issues on the table.

Adjudication After 1996: Practice, Procedures and Opportunities, 13 CONSTR. L. J. 369 (1997).

²¹⁹ See generally Martin Barnes, *The New Engineering Contract—An Update*, 13 INT'L CONSTR. L. REV. 89 (1996).

²²⁰ Again, recent British legislation will affect the enforcement of this provision. See generally Capper, *supra* note 218.

²²¹ See generally Stipanowich, *Beyond Arbitration*, *supra* note 2, at 84–85, 91–124, 131–135, 140–142, 145–164, 166–182 (discussing perceived advantages, limitations of mediation and analyzing recent industry experience).

²²² See *infra* Section VI.C.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

As planners and participants in the judicial realm discovered, a structured negotiation with the assistance of a third-party facilitator is a very flexible concept which adapts easily to the needs of the negotiating parties. It may or may not involve formal presentations and may be conducted in any mutually agreeable venue. It may or may not involve lawyer participation and is often described as speedier and less expensive than more elaborate conflict resolution techniques.

As a facilitated settlement negotiation, mediation tends to fall within the scope of evidentiary rules protecting communications made during the course of settlement discussions. Coupled with appropriate language in the agreement to mediate and judicial use of the “caucus” (*ex parte* sessions between the mediator and individual parties which permit the sharing of confidential information), mediation tends to be among the most private of conflict resolution techniques.²²³

Compared to a number of other dispute resolution procedures such as mini-trial, summary jury trial and nonbinding arbitration, all of which tend to emphasize predicting what will happen in later adjudicatory proceedings, mediation permits a consideration of the full range of issues the parties bring to the table, such as business or relationship considerations or communication problems. Mediation is, in short, the intervention strategy most clearly and directly targeted toward interest-based bargaining.²²⁴

Perhaps most importantly, mediation provides parties with the opportunity to take a primary role in structuring solutions to their own problems—solutions limited only by the imagination and willingness of the parties, their counsel and the mediator. The participation of the parties in the outcome enhances the likelihood that they will accept and live up to it. Finally, by bringing the parties to the table and generating light when previously only heat existed, mediation may reopen channels of communication in ongoing relationships, a particular advantage when controversy threatens progress midway through a construction project.²²⁵

Long a fixture in the collective bargaining arena, mediation gained widespread popularity as the premier instrument of the community justice and court-connected ADR movements. Its gradual adoption as a consensual conflict resolution mechanism in construction disputes was prefigured by its use in hundreds of state and federal court-connected conflict resolution

²²³ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 84–85.

²²⁴ See *infra* Section VI.C.

²²⁵ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 86.

programs.²²⁶ Having come to understand the value of mediation in the judicial setting, attorneys sought to transfer their experience to private contexts. Within the space of a few years, mediation clauses began appearing in standard industry documents in the United States and Canada—a trend culminating in the incorporation of mediation in the latest AIA standard documents.²²⁷ Today, mediation is probably the most common form of third-party intervention in construction conflicts—thanks, ironically, to borrowings from the court system by attorneys.

2. *What Do We Know About Mediation?*

What do we know about mediation in this setting? Recent research gives us some general information about its operation and hints of more; word-of-mouth anecdotes remain the chief source of details for most users. But the most significant data, touching upon the specific styles, strategies and tactics of mediators, is also the most elusive.

As was true of its manifestation in the court-annexed setting, mediation is a vague concept which covers a range of approaches. Recent studies tell us that mediation has been rapidly embraced by construction attorneys, many of whom purport a willingness to recommend its use in most or all cases.²²⁸ They tend to view the process as a cost-effective means of resolving conflict²²⁹ with few downsides. The construction attorneys' perceptions are supported by reported experiences with the process.²³⁰

²²⁶ See PLAPINGER & STIENSTRA, *supra* note 24, at 4.

²²⁷ See generally Stipanowich, *Beyond Arbitration*, *supra* note 2, at 84–85 (discussing mediation under U.S. contracts); Robert Knutson, *Standard Canadian Construction Contracts*, in *COMPARATIVE STUDIES IN CONSTRUCTION LAW: THE SWEET LECTURES* 37, 42–43 (A. Martin Odams ed., 1995) (discussing mediation under Canadian Construction Documents Committee CCDC 2).

²²⁸ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 91–94.

²²⁹ See *id.* at 94 n.142.

²³⁰ Relatively few attorneys responding to an American Bar Association Forum on the Construction Industry survey reported experiences involving revelation of trial strategy, sharing of confidential information, or delays and disruptions to the conflict resolution process. See *id.* at 121. According to a later survey by the same organization, reported mediations resulted in twice as many “positive” as “negative” experiences. Most of the time, moreover, there were significant savings of cost or time associated with this form of conflict resolution. See *id.* at 168–169, 176–178. Compare Peter Goetz & Frank Muller, *Viewpoint of Peter Goetz & Frank Muller*, in *ALTERNATIVE*

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

According to data from the construction bar, the great majority of mediators are attorneys or retired judges.²³¹ Although construction lawyers appear to be aware of the potential value of mediation in helping parties to maintain an ongoing relationship, the focus is most often on a monetary settlement. A 1991 survey of mediation experience among the construction bar revealed that nearly all reported mediated resolutions involved some form of monetary settlement, while relatively few resulted in other solutions such as an agreement to perform work.²³² A later industry-wide survey revealed that attorneys tended to evaluate the success or failure in terms of quick, economical resolution of discrete disputes rather than in terms of its impact on communications or relations between parties or procedures for handling future conflict.²³³

Finally, it is apparent that much of construction mediation practice is at variance with the “purist” facilitative model taught in most mediator training programs. Considerable evidence exists of the use of evaluative techniques in mediation. One of the most striking findings of recent industry studies is that in the great majority of construction mediations, the mediator offers “views regarding factual or legal issues.”²³⁴ What is more, the use of such techniques had a statistically significant correlation to higher settlement rates²³⁵—not the only measure of success in mediation, but certainly one most construction parties tend to emphasize. Because the mediators in the reported cases were nearly always attorneys, it is probable that their evaluations addressed legal issues.

Moreover, anecdotal evidence suggests that the most prominent construction mediators—most, if not all, of whom are attorneys—tend to

DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY 185 (Robert F. Cushman et al. eds.) (1990) (discussing mediation costs).

²³¹ See Stipanowich, *Beyond Arbitration*, supra note 2, at 116. An ABA Forum on the Construction Industry survey revealed that approximately 86% of mediators in reported cases were attorneys (65%) or retired judges (21%). See *id.*

²³² See *id.* at 120.

²³³ See *id.* at 171–176. Responding to the same survey, however, design professionals and contractors who described negative experiences in mediation placed relatively more emphasis on the failure to preserve or improve communications or relations between the parties. See *id.*

²³⁴ See *id.* at 118.

²³⁵ See *id.* at 122–124.

employ personal evaluations at some point in the proceedings.²³⁶ The model is not unlike that employed by many personal injury mediators, although in this context the factual schemes and legal issues tend to be much more complex.

While drawing conclusions is always hazardous in the absence of complete information,²³⁷ it appears that as currently practiced, construction mediation tends to be lawyer-driven. It is usually a process resorted to not to sustain a relationship or improve communications in the interest of keeping a project going, but to achieve the limited purpose of sorting out the damages in the wake of an irretrievably broken relationship. In such cases, interest-based discussions quickly give way to hard-dollar negotiations.

There are, to be sure, exceptions, and timing may have much to do with it.²³⁸ When a major public housing project threatened to shut down as

²³⁶ What is becoming clear, moreover, is that evaluation means very different things to different people. In a presentation to the A.B.A. Forum on the Construction Industry, Professor Eric Green made it clear that he views evaluation, meaning "the mediator's prediction of how the actual judge, jury or arbitrator(s) . . . will decide the case," as a primary element in the mediator's strategic arsenal. Eric D. Green, *Successful Mediation of Construction Claims, Construction Advocacy & All That Jazz*, ABA Forum Annual Meeting 8 (Apr. 25, 1997) (on file with author). He indicated, however, that such predictions should be reserved until other approaches had been exhausted and distinguished this form of evaluation from a personal judgment of the issues, which he categorized as inappropriate. *See id.* But another construction neutral, in describing his own approach to mediation, explains:

After receiving all relevant materials . . . and permitting each party a separate, private opportunity to present its best case, the mediator is prepared, with the parties' consent, to present proposed settlement terms for separate consideration by each party. [If the parties consent to go forward, the mediator then presents the proposed settlement terms.]

Kenneth Feinberg, *Viewpoint of Kenneth Feinberg*, in *ALTERNATIVE DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY*, *supra* note 230, at 192, 195. *See also* George Marcus & Paula Marcus, *Fact-Based Mediation for the Construction Industry*, *ARB. J.*, Sept. 1987, at 7 (describing mediation procedure in which neutrals meet with the parties, then conduct fact-finding, technical analysis and expert evaluation, before issuing a report to the parties); Smith et al., *supra* note 208, at 31 (describing widespread practice of mediators giving advisory opinions, and limits on such activities in some jurisdictions).

²³⁷ Isn't that, after all, one of the concerns about opinion-giving in mediation?

²³⁸ Evaluative mediator Kenneth Feinberg notes that while mediation might be used to resolve disputes during construction, "[A]ll the construction disputes I have mediated

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

a result of multiple controversies, a public housing authority and the general contractor sought to retain an arbitrator. For a number of reasons, however, it became clear that the immediate interests of the parties would be better served by a form of intervention focused not on responsibility for past events but on the future progress of the job.²³⁹ The result was an ongoing facilitation over a period of months, centered on weekly project meetings. The neutral's facilitative role consisted of mediating current conflicts and helping the parties to anticipate and address future issues. These efforts permitted the successful completion of the project while prior claims were held in abeyance.

Likewise, situations exist where a mediator may find it possible to expand the pie to enhance the value to all parties to a construction-related dispute. A recent example involved a major business which terminated a contractor for default after a dispute over the quality of work. In mediation, it quickly became apparent that the contractor was anxious to continue the relationship with the customer, and that the customer's remedial alternatives were much more expensive. It then became a matter of ascertaining whether and under what circumstances the customer would permit remedial work to be done by the original contractor—a possibility which became a reality with some assistance from the contractor's surety and technical input from engineers on both sides. The mediated settlement incorporated the terms of a new contract which included repair work as well as other improvements.

Again, however, these are not the usual cases. By the time mediation is sought in most disputes, legal representatives have become involved and engage the mediator in the same "litigotiation" mode in which mediators are often utilized in court-connected programs. The attorneys usually turn, not surprisingly, to one of their own as a neutral.²⁴⁰ In making the selection

were controversies that arose after completion of the project." Feinberg, *supra* note 236, at 192 n.34.

²³⁹ Prior to agreement on the shift of neutral roles, the author made clear to the parties that functioning as a facilitator entailed likely prejudice to the role of arbitrator.

²⁴⁰ For example, Leslie King O'Neal, a partner in the Orlando law firm of Holland & Knight and the chair of the American Bar Association Forum on the Construction Industry, the nation's largest organization of lawyers with construction practices, selects mediators based on "[k]nowledge of construction law and construction process—preferably from having handled complex construction cases; good mediation skills; [and] good communication skills." Letter from Leslie King O'Neal to Thomas J. Stipanowich 2 (July 14, 1997) (on file with author). Mark Anderson, Vice President for a major consulting service to the industry, Hill International, Inc., looks for

they talk to other attorneys and, increasingly, to the would-be mediators themselves, to get some kind of idea about what kind of mediator they will be.²⁴¹

But the kind of information they want is elusive. They want to know what kind of value a given mediator will add to the process. Measuring a mediator's performance is particularly tricky, since rarely does anyone see all of the mediator's efforts; even mediators have a hard time explaining what they do. Inevitably, in the search for a convenient method of describing "value added," there will be some discussion of whether the mediator helped settle cases.

In many cases, this process will produce a nominee who places a premium on getting the case settled, whatever it takes. The individual is likely to employ evaluative techniques, at least to the extent of conveying predictions of the likely outcome of adjudication on the merits. The confidence with which she speaks the language of legal process and the mechanics of construction claims enhances her reputation in the eyes of the lawyers, who transmit their perceptions to their clients and others. (Of course, she is immeasurably aided in this respect if she is already a legal specialist of some standing.)²⁴²

Unquestionably, the mediator will be aided in the task of achieving settlement by reputation, for success breeds success. If I have it on good

"[e]xperience [with the same] type of project, and familiarity with the fundamentals of construction claims (as manifested in the concepts of causation, liability and damages)." Letter from Mark Anderson to Thomas J. Stipanowich 3 (July 13, 1997) (on file with author).

²⁴¹ Leslie O'Neal states, "My most important consideration is my experience with the provider or the experience of partners, friends, [and] colleagues. If I don't know the [mediator], I solicit as much information as possible from others who have had experience with him or her." Letter from Leslie King O'Neal to Thomas J. Stipanowich, *supra* note 240, at 2. Mark Anderson echoes, "Identifying seasoned, qualified and competent mediators remains largely a personal relationship and referral industry. It is often advisable to interview shortlisted candidates." Letter from Mark Anderson to Thomas J. Stipanowich, *supra* note 240, at 4. As the in-house counsel for RTKL, a major international A/E firm based in Baltimore, notes, "Often you can speak with references . . . and determine the [mediator] style you prefer in advance of mediation. If references are not available, it is often possible to speak to the mediator, and determine . . . his style and approach." Letter from Karen Koenig Blose (Aug. 8, 1997) (on file with author).

²⁴² As Leslie O'Neal observes, "Knowledge [of construction cases] helps in many ways, including the parties' willingness to listen to the mediator's comments." Letter from Leslie King O'Neal to Thomas J. Stipanowich, *supra* note 240, at 2.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

authority that the royal touch cures scurvy and a variety of other maladies, I might believe just enough to permit myself to be healed. If we begin to accept that the itinerant “professor” can conjure music from a band of novices, then music may be what we hear when we heed his admonition to “concentrate.” It is only a matter of time before present trends produce a class of lawyer/“super-mediators” who, in the manner of Gerry Spence, claim a long, unbroken string of “victories” at the negotiation table.

Many attorneys and clients may be perfectly satisfied with this approach. Better, say advocates, to make their presence felt than to be mere message carriers.²⁴³ But such tactics, applied indiscriminately, may take a significant toll on users and their relationships. As one insider complained:

Unfortunately, [the practice of judging mediators by their ability to bring about a settlement] has placed significant pressure on mediators and the mediation process to settle the case, often at any and all costs. The result [is that] a process . . . which was created to allow for the amicable and reasoned resolution of disputes . . . often becomes a death sentence . . . to the parties’ relationship and . . . leaves the parties with nothing good to say about the process or the mediator other than “. . . at least it is over.”²⁴⁴

An example involving a leading architectural-engineering (A/E) firm illustrates the downside of indiscriminate emphasis on a hard-driven dollar settlement. Engaged in a two-party dispute with a major contractor, the firm sought mediation partly in hopes of enhancing communications with the other party. They chose a mediator who was a construction attorney with considerable mediation experience and many references. Unfortunately, the parties insufficiently explored the mediator’s style and strategies and their appropriateness to the parties’ goals. At the end of the day, the mediator had settled the dispute, but at a cost. According to the A/E firm’s attorney, the only contact between the parties consisted of short presentations before the mediator. The mediator quickly summarized the parties’ respective positions and, having apparently reached his own conclusions about the bona fides, separated the disputants and spent the rest

²⁴³ Ms. O’Neal summarizes, “I have had worse experiences with mediators being too passive than too aggressive.” Letter from Leslie King O’Neal to Thomas J. Stipanowich, *supra* note 240, at 2.

²⁴⁴ Letter from Mark Anderson to Thomas J. Stipanowich, *supra* note 240, at 4.

of the day "beating on the parties" to achieve a settlement. To the client's horror, no opportunity existed to enter into a mutual discussion or seek a consensus of any kind—only a "shuttlecock dickering" over dollars. Despite a dollar settlement, the client emerged with no intention to repeat the mediation experience.

If a leading A/E firm represented by sophisticated counsel has this kind of experience in mediation, one wonders what is happening in the great run of cases. Clearly, users and their attorneys need a good deal more education about the range of mediator styles and strategies, permitting meaningful inquiries of prospective neutrals.

Unfortunately, current data does not provide specific guidance regarding the use of evaluation in mediation. Evaluative mediators are apparently sought out a good deal of the time by attorneys and parties in construction cases. It is obvious, however, that opinions must be offered with care, because they may fix positions in negotiating and undermine the neutral's ongoing facilitative role. Different approaches with substantially different implications include: one-on-one queries regarding "worst case" scenarios; hard, close and confidential interrogations about the risks and costs of litigating a particular matter, including decision tree analysis; and judgments from the hip in joint sessions.

We need to know a lot more about mediator techniques, and either do a better job of providing guidance to prospective users or ensure that they receive better counseling.²⁴⁵ At the same time, we need to consider the effect of timing on mediation and whether more proactive use of the process, closer to the emergence of conflict and prior to initiation of litigation or arbitration, is feasible. The opportunity to visit these and other questions may be presented by recent changes to standard industry contracts.

D. Mediation Becomes the Status Quo

For many years, the mounting complexity of standard form contracts and increasing formality and intricacy of contractual provisions governing the handling of claims and controversies have been at odds with traditional business practice in the construction industry, which puts a high priority on

²⁴⁵ In an attempt to develop a better appreciation of mediator methods, the National Association of Securities Dealers now requires would-be mediators to provide recommendations from at least four individuals who have observed their mediation techniques. See NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., NASD MEDIATION: AN ALTERNATIVE PATH TO RESOLVING SECURITIES DISPUTES 7 (1995).

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

resolving disputes quickly and informally to prevent disruption or derailment of long-term relationships.²⁴⁶ In striving to address with a lawyer's precision every possible contingency in the claims cycle, the authors of the 1987 edition of primary AIA documents lost sight of the need for "machinery to work things out."²⁴⁷ The growing gap between rules and reality—the perceived imbalance between the benefits and cost of existing processes—has given momentum to the movement toward less formal, more efficient alternatives for resolving disputes, such as mediation and dispute review boards.²⁴⁸

In the past decade, there has been a growing recognition that industry contract documents should place greater emphasis on the use of informal, nonadjudicative techniques rather than rely so heavily on adversary procedures. The incorporation of mediation and other approaches in standard form contracts is a logical result of parallel developments in courts and agencies, the initiatives of several leading industry organizations²⁴⁹ and the founding of an interdisciplinary coalition supported by all sectors of the industry.²⁵⁰ At least one major industry insurer has for some time offered financial incentives for precontractual efforts to avoid disputes and post-dispute efforts to settle.²⁵¹

The 1997 edition of the American Institute of Architects contract documents requires mediation "as a precondition to arbitration or any legal

²⁴⁶ The importance of personal relationships in the construction contracting business is borne out by the vast numbers of personal references in corporate biographies, which read more like extenuated corporate "begats."

²⁴⁷ Stipanowich, *Beyond Arbitration*, *supra* note 2, at 73.

²⁴⁸ See generally *id.* See *infra* Parts V–VI.

²⁴⁹ In 1996, numerous industry bodies joined in a Declaration of Principles for Prevention and Resolution of Disputes in the Construction Industry, an unprecedented commitment to cooperative, systematic approaches to conflict avoidance and resolution. See *DART Declaration Signed at Historical Ceremony*, DART NEWSLETTER, Spring 1996, at 1,3.

²⁵⁰ The Dispute Avoidance and Resolution Task Force (DART), founded as a three-year pilot program in 1991, did much to raise the consciousness of the industry. In 1994, the American Arbitration Association took over funding and administration of the program.

²⁵¹ The positive experience of DPIC, one of two leading errors and omissions carriers for architects and engineers, with its mediation referral program is described in Goetz & Muller, *supra* note 230, at 175. See *infra* note 268 (describing partnering incentives).

or equitable proceeding.”²⁵² Although one may have reservations about an all-purpose boilerplate requirement of this kind, on balance it is probably a very positive development. The incorporation of a provision requiring mediation of conflicts in the 1997 AIA documents will reinforce current trends toward the use of mediation (and, perhaps, other forms of intervention) and will underline the need for better understanding of the process, the roles of neutrals and the timing of intervention.²⁵³

By identifying mediation as a step in the claims process between an architect's decision (the old “first-tier” determination) and arbitration, a progression that usually begins soon after issues arise, the drafters have enhanced the possibility that mediation will occur early enough to mitigate the impact of a dispute on the project and on contractual relationships. The effect, to put it another way, is a deliberate, facilitated “loop-back” to negotiation after the first, brief rights-based analysis.²⁵⁴ Thus approached, mediation might avoid the “litigotiation” motif which is so prevalent when intervention commences only when the relationship is over and prospects for integrative solutions are significantly narrowed.

Under the new AIA contracts, mediation is to be conducted under the AAA rules unless the parties agree otherwise.²⁵⁵ Among other things, these rules establish a mechanism for mediator appointment with the assistance of

²⁵² AIA A201, *supra* note 112, § 4.5.2; AMERICAN INSTITUTE OF ARCHITECTS DOCUMENT B141, CONTRACT BETWEEN THE OWNER AND ARCHITECT (1997) [hereinafter AIA B141] § 1.4.3.4.1. *See* Paul M. Lurie, Construction Mediation Under the 1997 AIA Documents, AIA Contract Documents: Generation Next (Oct. 23-24, 1997) (on file with author).

²⁵³ Although our focus is on process issues, another reform introduced by the AIA drafting committee may have an even more profound, long-lasting effect on claims practice and conflict resolution in the construction arena. The 1997 owner-contractor agreement incorporates a mutual waiver of consequential damages—long the driver of construction claims and controversy. *See* AIA A201, *supra* note 112, § 4.3.10. Although it is likely that legal advocates will use all of their ingenuity to find ways around these limitations, the enforcement of the mutual waiver could substantially reduce the financial incentive for parties and their lawyers and claims consultants to spend tens or hundreds of thousands of dollars to wage a major campaign in pursuit of lost dollars. *See* Stipanowich, *Rebuilding Construction Law*, *supra* note 11, at ____.

²⁵⁴ *Cf.* URY ET AL., *supra* note 14, at 52–56.

²⁵⁵ *See* AIA A201, *supra* note 112, § 4.5.2; AIA B141, *supra* note 252, § 1.4.3.4.1.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

a disinterested neutral administering organization and set out basic ground rules for the mediation.²⁵⁶

Hopefully, rather than encouraging a “one-size-fits-all” mentality, the commitment to mediate will stimulate a range of proactive solutions, including not only earlier, more integrative mediated bargaining, but also early neutral evaluation and DRB-type programs, with or without attorneys. Ideally, such considerations would play a part in deliberate front-end planning. The increasing use of such processes will in turn permit the gathering of a significant body of empirical information regarding specific applications. The lessons of experience should be summarized and communicated to those charged with selecting procedures to be used in specific contractual settings. Major emphasis should be placed on helping users and their legal representatives to understand the range of styles and approaches employed by third-party intervenors.

Finally, the incorporation of mediation as a part of the AAA claims resolution process reinforces the need to think in broader terms about the entire schema of conflict resolution—and not just of solitary processes. The stepped process unveiled by the AIA, and the AAA’s resulting unification of construction mediation and arbitration procedures in a single document under the heading of Construction Industry Conflict Resolution Procedures,²⁵⁷ reflect the emerging notion of a conflict resolution *system* which provides a range of intervention tools, employed alternatively or successively, to meet the priorities of particular users.

Although the AIA/AAA approach provides an industry-wide template, similar approaches are increasingly employed by individual organizations in structuring their own commitments. A growing number of major U.S. companies are developing carefully designed multistep ADR processes or “filtering systems” for particular long-term contractual relationships.²⁵⁸ As

²⁵⁶ In response to the AIA’s formal incorporation of the AAA Construction Industry Mediation Rules in its claims procedure, the AAA published those procedures in a single pamphlet with its Construction Industry Arbitration Rules. See AAA PROCEDURES, *supra* note 149, Rules M-1 to M-17.

²⁵⁷ See *id.*

²⁵⁸ See generally BUILDING ADR, *supra* note 102 (summarizing efforts of corporate ADR programs by BASF Corporation, Chevron, CIGNA, Eaton Corporation, Ford Motor Company, Motorola, and many other companies); David Mulford, *Establishing and Implementing a Corporate ADR Program*, in ADR: A PRACTICAL GUIDE, *supra* note 206, at 371 (outlining systematic approach to ADR planning for organizations with many outstanding contracts and large volume of related disputes). One would expect to see the widest range of possibilities in the case of long-term

previously discussed, a multi-phased ADR program was devised for the nation's largest construction project, the Boston Central Artery/Tunnel Project.²⁵⁹

Another example from the construction arena is offered by a major institutional owner in Canada. British Columbia Hydro (BC Hydro), frustrated with its inability to handle project claims and controversy by expanding contract verbiage, established an ADR program that begins with face-to-face negotiation and progresses, if necessary, through the following increasingly formal steps: an initial decision by a BC Hydro representative, a review of the initial decision by a standing neutral and, ultimately, an appeal to binding arbitration.²⁶⁰ In the first three years of operation, BC Hydro used the system in 119 contracts involving \$55 million in construction. Forty-seven disputed claims were processed through the system; all but twelve were negotiated face-to-face. Only two reached the "standing neutral," and all were settled prior to binding arbitration.²⁶¹

Although the specifics vary, all of these systems tend to share the following key features: (1) an initial emphasis on face-to-face negotiation

contractual relations within a firm, including individual employment contracts. In mid-1993, Brown & Root, one of the nation's largest contracting firms initiated a "four-option" dispute resolution program for handling employment disputes. *See also* Internal Employee Pamphlet, The Brown & Root Dispute Resolution Program (June 15, 1993) (on file with author). The program involves a stepped plan—incorporating both internal procedures and external, independently administered procedures—that bears some of the earmarks of conflict resolution procedures traditionally employed in collective bargaining agreements. First, employees who believe they have a grievance are encouraged to take their problem through the company chain of command. They have the opportunity to speak with a confidential adviser, and in some cases may also be approved to receive monetary support for legal consultation. If this in-house process fails to resolve the matter, the workers may call for a conference with a company representative and dispute resolution program administrator to discuss various mechanisms for handling the problem. In the case of legally protected rights such as protection from discrimination or harassment, the employees are directed to AAA-sponsored mediation and, if necessary, arbitration. The Brown & Root plan, although built around a sequence of fixed procedural steps, is variegated to address the range of potential problems that are likely to arise in the workplace. It also incorporates dynamic elements including a confidential adviser and other informal in-house mechanisms for charting specific solutions. *See also* Rockwell International, Employee Issue Resolution Process (incorporating similar stepped process).

²⁵⁹ *See supra* text accompanying notes 209–214.

²⁶⁰ *See generally* Paul Sandori, ADR in Canadian Construction Contracts, Charting the Course to the Year 2000 Together! (Oct. 18, 1994).

²⁶¹ *See id.* at 18–20.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

among key participants in the transaction, sometimes including “stepped negotiation” arrangements in which negotiations move up the organizational chain, further and further from intimate, day-to-day involvement with the transaction; (2) at some point, the introduction of third-party intervention strategies aimed at facilitating interest-based bargaining and providing outside perspectives on rights and power issues, all with the aim of encouraging resolution of conflicts short of binding adjudication; and (3) if all else fails, resort to binding arbitration or litigation.²⁶²

As with any ADR process, careful planning is required to avoid problems. Given the wide range and diversity of contractual arrangements, great care must be taken in adapting the process to the circumstances.²⁶³ As Stewart Macaulay once observed, “[a]ny technique of dispute avoidance or settlement will only be invoked if it is advantageous after the potential benefits and costs are balanced.”²⁶⁴

With multi-step programs, moreover, the possibilities of unanticipated procedural dilemmas are magnified.²⁶⁵ The first of what will undoubtedly be numerous judicial decisions dealing with the special problems of

²⁶² The approaches tend to follow some of the basic principles described by Ury, Brett and Goldberg, including placing additional focus on party interests, providing low-cost assessments of relative rights and power elements as “backups” to negotiation and arranging procedures in a low to high-cost sequence. *See generally* URY ET AL., *supra* note 14, ch.3.

²⁶³ *See* Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 568 (1969). Industry-oriented “helps” have been developed by various groups. Construction lawyers have offered specific guidelines for retrofitting different ADR techniques into standard industry boilerplate. *See generally* Robert G. Taylor & Buckner Hinkle, Jr., *How to Use ADR Clauses with Standard Form Construction Industry Contracts*, 15 CONSTRUCTION LAW. 42 (Apr. 1995); *cf.* DISPUTE RESOLUTION CLAUSES: A GUIDE FOR DRAFTERS OF BUSINESS AGREEMENTS, CPR LEGAL PROGRAM (1994). A much-publicized “engineered” contribution, predictably, was a computer-assisted mathematical model for predicting the likelihood of disputes on a project. *See* Boute, et al., *Disputes Potential Index: A Cholesterol Test*, 1994 CII Conference. Although both are helpful, neither of these tools provides a sufficient basis for determining the suitability of a particular process for particular circumstances. A recent attempt at developing an aid for this purpose is a computerized ADR “Suitability Screen.” *See* CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR ADR SUITABILITY SCREEN (1996).

²⁶⁴ Macaulay, *Elegant Models*, *supra* note 77, at 510.

²⁶⁵ *See* Letter from Sharon F. Daily to Carl Ingwalson (May 9, 1995) (collection of seemingly innovative but unworkable ADR provisions) (on file with author).

multifaceted ADR provisions appeared only three years ago.²⁶⁶ The key to proper ADR planning and, indeed, the best possible grounding for any long-term contractual relationship, may lie in facilitated "partnering."

V. TOWARD THE ROOTS OF CONFLICT: PARTNERING

A. *Ritualizing Relational Attributes*

Contemporary profiles of the industry indicate that construction firms reporting a higher level of profitability tend to be committed to project management and systems approaches such as total quality management (TQM).²⁶⁷ A common component of construction TQM processes is "partnering," a concept derived in part from the recent Japanese/American experience.²⁶⁸ Partnering formalizes the following aspects of enterprise planning traditionally employed by successful contracting entities: getting to know your contracting partner; identifying common goals and discussing specific plans and expectations; and establishing clear channels of communication and fail-safe mechanisms for resolving potential problems.²⁶⁹ Partnering was first utilized extensively in the public works arena,²⁷⁰ and has been championed by multi-disciplinary industry

²⁶⁶ See, e.g., *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352 (Tex. Ct. App. 1995) (under terms of multi-door ADR provision in contract for construction of new chemical plant, arbitration could not be compelled if parties agreed to an alternative procedure such as mediation).

²⁶⁷ See DESIGN AND CONSTRUCTION, A JOINT PROJECT OF DELOITTE & TOUCHE AND THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA 3 (1993).

²⁶⁸ The term partnering was also used to describe contracting strategies employed in the U.S. manufacturing and distribution sector in the 1980s; such strategies involved "highly structured agreements between companies to cooperate to an unusually high degree to achieve their separate but complementary objectives." E. Lynn Cook & Donn E. Hancher, *Partnering: Contracting for the Future*, 6 J. OF MGMT. IN ENGINEERING 431, 432 (1990). See generally James C. Anderson & James A. Narus, *Partnering as a Focused Market Strategy*, 33 CAL. MANAGEMENT REV. 95 (1991); Frank K. Sonnenberg, *Partnering: Entering the Age of Cooperation*, 13 J. OF BUS. STRATEGY 49 (1992).

²⁶⁹ See generally Cook & Hancher, *supra* note 268.

²⁷⁰ See, e.g., NORMAN C. ANDERSON, WASHINGTON STATE DEP'T OF TRANSPORTATION, MANAGING CONFLICT ON CONSTRUCTION CONTRACTS (PARTNERING) (1992) (describing early state D.O.T. partnering program, first developed in late 1989); IWR WORKING PAPER, *supra* note 59 (describing the pioneering efforts and increasing

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

organizations such as the Construction Industry Dispute Avoidance and Resolution Task Force (DART)²⁷¹ and the Construction Industry Institute (CII).²⁷²

Partnering represents yet another step in the “upstream” progression of deliberate third-party intervention in construction contract relationships—from binding adjudication (arbitration) to settlement of conflict (mediation, nonbinding evaluation) to facilitated planning of long-term relationships. Partnering, founded on the notion that early engagement has the greatest ability to influence costs,²⁷³ sets the stage for ongoing collaborative effort—

use of partnering by the U.S. Army Corps of Engineers); U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, CONSTRUCTION DIVISION, *PARTNERING: A NEW CONCEPT FOR ATTAINING CONSTRUCTION GOALS* (1991); Mark E. Appel, *Partnering: New Dimensions in Dispute Prevention and Resolution*, ARB. J., June 1993, at 47–48 (discussing use of partnering in government contract processes); John G. Bickerman, *Partnering in the Construction Industry: Teaming Up to Prevent Disputes*, 9 PROB. & PROP., Apr. 1995, 61 (discussing use of partnering by U.S. Army Corps of Engineers, and by private companies such as Shell Oil, Union Carbide, DuPont, Procter & Gamble and IBM).

²⁷¹ See BUILDING SUCCESS FOR THE 21ST CENTURY: A GUIDE TO PARTNERING IN THE CONSTRUCTION INDUSTRY, REPORT OF THE DISPUTE AVOIDANCE AND RESOLUTION TASK FORCE OF THE AMERICAN ARBITRATION ASSOCIATION (1996) [hereinafter DART REPORT].

²⁷² A number of CII publications extol many benefits of partnering. See generally IN SEARCH OF PARTNERING EXCELLENCE, SPECIAL PUBLICATION 17–1, PARTNERING TASK FORCE, CONSTRUCTION INDUSTRY INSTITUTE (1991) [hereinafter PARTNERING EXCELLENCE]; PRE-PROJECT PLANNING: BEGINNING A PROJECT THE RIGHT WAY, PREPARED BY THE CONSTRUCTION INDUSTRY INSTITUTE PRE-PROJECT PLANNING RESEARCH TEAM, Publication 39–1 (1994) [hereinafter PRE-PROJECT PLANNING]; TEAM BUILDING: IMPROVING PROJECT PERFORMANCE, PREPARED BY THE CONSTRUCTION INDUSTRY INSTITUTE PROJECT TEAM BUILDING TASK FORCE, Publication 37–1 (July 1993). See also CONSTRUCTION INDUSTRY INSTITUTE STRATEGIC PLANNING COMMITTEE, ASSESSMENT OF CONSTRUCTION INDUSTRY PROJECT MANAGEMENT PRACTICES AND PERFORMANCE 8 (1990) (concluding that “strategic project organizing” may result in potential gross savings of up to 20%). At least one major insurer of design professionals programmed incentives into its errors and omissions policies to encourage the use of partnering processes. See generally *Partnering*, in DPIC COMPANIES, INC., THE CONTRACT GUIDE: DPIC’S RISK MANAGEMENT HANDBOOK FOR ARCHITECTS AND ENGINEERS (Supp. 1994) [hereinafter DPIC HANDBOOK].

²⁷³ See PRE-PROJECT PLANNING: BEGINNING A PROJECT THE RIGHT WAY, PREPARED BY THE CONSTRUCTION INDUSTRY INSTITUTE PRE-PROJECT PLANNING RESEARCH TEAM, Publication 39–1 (1994).

for *solidarity*, *reciprocity* and *trust* in a long-term relationship²⁷⁴—by bringing primary project participants together to discuss thoroughly all facets of the project and their relationship. Successful partnering educates team members—owners, contractors, design professionals, major subcontractors and primary third parties (such as insurance underwriters or lenders)—about their partners' business practices and expectations, sharpens risks, clarifies lines of communication, anticipates problems and seeks the commitment of project leadership to common goals and collaborative problem solving. Partnering, then, acknowledges that in long-term relationships the traditional arms-length model of dealing must give way to a mutual commitment to shared (or complementary) goals in an atmosphere of mutual trust and cooperation.²⁷⁵ Partnering ritualizes the establishment of relational bonds and better equips team members to confront the uncertainties of performance in a flexible yet principled manner. Although partnering practices are still largely confined to the construction industry and the manufacturing and distribution sectors, the model may be of significant benefit in other long-term relationships.

A recent canvas of industry groups revealed widespread positive perceptions of partnering among design professionals, contractors and lawyers,²⁷⁶ although relatively few attorneys claimed direct experience with the process outside of public procurement.²⁷⁷ Architects, engineers and contractors viewed project partnering as superior to mediation, dispute review boards, arbitration and other discrete ADR processes when it came to reducing the time and cost associated with conflict resolution,²⁷⁸ reducing the likelihood of future disputes,²⁷⁹ opening channels of

²⁷⁴ See PARTNERING EXCELLENCE, *supra* note 272, at iv; cf. Macneil, *supra* note 76, at 348–349.

²⁷⁵ See Cook & Hancher, *supra* note 268, at 433; Smith et al., *supra* note 208, at 30. One lawyer with partnering experience defines the process as “the express recognition of the implied covenant of good faith and fair dealing.” Kimberly A. Kunz, *Counsel's Role in Negotiating a Successful Construction Partnering Agreement*, 15 CONSTRUCTION LAW. 19, 19 (1995).

²⁷⁶ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 144–79.

²⁷⁷ See *id.* at 145. Partnering, like industry-inspired ADR processes such as DRBs, is often described as a reaction to the perceived over-legalization of the construction process. Lawyers are not often prominent players in such processes, although there are notable exceptions. See generally Kunz, *supra* note 275.

²⁷⁸ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 148–49.

²⁷⁹ See *id.* at 150–151.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

communication,²⁸⁰ preserving or enhancing relationships among project participants²⁸¹ and meeting job budgets.²⁸² Reports of actual experiences with partnering also reflected significantly more positive experiences than did summaries of mediation and other ADR processes.²⁸³ Reported “positive” results usually included: preserving or improving communications or relations among parties, reducing the cost or delay associated with conflict resolution, resolving conflicts and establishing procedures for handling future problems.²⁸⁴ A majority within each professional group predicted increasing use of partnering in the coming years²⁸⁵ and expected their own agency or organization to encourage use of the process.²⁸⁶

B. Successful Project Partnering

Most discussions of partnering at the project level focus on a facilitated workshop conducted at the beginning of a construction project.²⁸⁷ Participants include representatives of the owner, the contractor and other “stakeholders”—individuals closely affiliated with the project as well as key decision makers higher in the organization. A typical multi-day partnering session might begin with training and exercises focusing on interpersonal communication, “disputing” styles and management of conflict.²⁸⁸ The

²⁸⁰ See *id.* at 151.

²⁸¹ See *id.* at 151–152.

²⁸² See *id.* at 152.

²⁸³ See *id.* at 171.

²⁸⁴ See *id.* at 172; see also PARTNERING EXCELLENCE, *supra* note 272, at 8–10, 17–18 (describing relational benefits identified by respondents to CII survey and summarizing many identified benefits of partnering); ANDERSON, *supra* note 271, at 14–21 (detailing responses to Washington State Department of Transportation survey on partnering effectiveness); cf. Appel, *supra* note 271, at 47 (describing results of 1989 construction industry survey on expectations of partnering).

²⁸⁵ See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 154–156.

²⁸⁶ See *id.* at 158–159.

²⁸⁷ See ANDERSON, *supra* note 270, at 3–5, 12–13; Robert A. Shearer et al., *Partnering: A Commitment to Common Goals*, DISP. RESOL. J., June 1995, at 30; Appel, *supra* note 270, at 48–49. Although most initial partnering workshops are one or two days long, the Corps of Engineers reports workshops extending as long as four days. See IWR WORKING PAPER, *supra* note 59, at 19. Obviously, extended sessions of the latter kind are unlikely to be cost-beneficial except on large projects.

²⁸⁸ See IWR WORKING PAPER, *supra* note 59, at 20–21.

agenda also includes discussion of the project mission, the specific performance objectives and expectations of companies and individuals and, in some cases, the development of a specific dispute resolution process for handling conflict on the project.²⁸⁹ The initial partnering session often concludes with the signing of a project charter setting forth the team's mission and specific goals—a document which may be displayed prominently at the project site.²⁹⁰

To be effective, however, partnering must involve far more than a discrete event in the life of a project; it must permeate and become an integral part of project relationships. While the inaugural workshop is often described as the “centerpiece” of partnering, it must reflect a commitment of the highest levels of management that is transmitted through the ranks to the level of field personnel.²⁹¹

Second, the initial partnering conference must be something more than a simplistic “Getting to Yes” drill: a feel-good exercise which results in collective intonation of general platitudes—and business as usual during performance of the contract.²⁹² Successful partnering is, after all, about addressing the real needs of team members and reinforcing the values of reciprocity, solidarity and trust which must animate successful partnerings. It is therefore essential that the workshop treat real project planning issues,²⁹³ allowing project participants to state their respective requirements in frank and specific terms and to model the behaviors that will sustain those ends in the long term. Thus, a workshop agenda might involve detailed treatment of: (1) project roles and responsibilities (beginning with project planning and proceeding chronologically through design, procurement, construction and project closeout); (2) plans for the distribution of project documents; (3) the project schedule, with emphasis on activities critical to project completion; (4) the design process, including

²⁸⁹ See ANDERSON, *supra* note 270, at 12–13.

²⁹⁰ See Appel, *supra* note 271, at 50–51.

²⁹¹ See PARTNERING EXCELLENCE, *supra* note 272, at 6; Bickerman, *supra* note 270 at 63. Because it involves “multi-level interfacing,” partnering can minimize the adverse effects of project personnel turnover. See Cook & Hancher, *supra* note 268, at 434.

²⁹² See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 163 n.298.

²⁹³ See IWR WORKING PAPER, *supra* note 59, at 23 (describing partnering session for local flood protection project sponsored by Army Corps of Engineers in which “partners tested out their new partnership by tackling concrete technical problems”); see also Appel, *supra* note 270, at 49–50.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

current design status, outstanding issues, schedule of design reviews and information required to complete the design; (5) procurement, including the status of subcontracts, the bidding process for remaining subcontracts and owner-supplied or owner-required equipment; (6) the construction process, including safety procedures, preconstruction conferences and other meetings, temporary utilities, construction administration and status reports; (7) the payment process, including pay request forms and supporting materials, and project accounting procedures; (8) the handling of changes to the project design, including what constitutes a change, forms for the ordering of changes, procedures for equitable adjustment of the contract price and time, and approval procedures; (9) project closeout procedures, including the development and execution of punch lists for correcting or completing the work, definitions of substantial completion and final completion; (10) the preparation of operations and maintenance manuals and training, and start-up procedures for process equipment; (11) warranty periods for goods, systems or services; and (12) the preparation of record documents for the project.²⁹⁴ Key elements of these facets of the project may be summarized in the written record of the meeting, or "partnering notebook," along with the main partnering agreement or "charter." These elements, reviewed periodically during regular meetings of team members and evaluation,²⁹⁵ will become the "measuring sticks" for implementation of the partnering plan during performance of the work.²⁹⁶

The initial partnering conference is also the ideal platform for exploration of a structure for long-term governance of the relationship, including a variegated conflict resolution scheme.²⁹⁷ The result might be a conflict resolution system that places initial emphasis on informal, face-to-face problem solving and integrative bargaining, followed by settlement-

²⁹⁴ A format for a well-integrated partnering program is described in Kunz, *supra* note 275.

²⁹⁵ See DART REPORT, *supra* note 270, at 8.

²⁹⁶ See Shearer et al., *supra* note 287, at 31-32.

²⁹⁷ See Appel, *supra* note 271, at 50; Bickerman, *supra* note 270, at 61. There are those, such as Professor Williamson, who question the ability of techniques such as partnering, which embody general commitments to joint profit-maximization, to address "the proclivity of human agents to make false and misleading . . . statements" and to appropriate as much of the gain as possible. Williamson, *Transaction Cost*, *supra* note 78, at 241-242. In light of such tendencies, successful partnering should also address the establishment of "[g]overnance structures which attenuate opportunism and otherwise infuse confidence." *Id.* at 242.

oriented interventions (mediation, nonbinding evaluation, dispute review boards), and, ultimately, adjudication (often some form of binding arbitration). Of course, such efforts come face-to-face with the natural tendencies of new partners to bask in the sunshine of a dawning relationship and avoid addressing the sharp realities of the future. Yet if not in the conducive environment of partnering, where?²⁹⁸

It is often said that partnering must be carefully distinguished from the process of establishing legal rights and responsibilities between team members.²⁹⁹ But the present model is heavily derivative of its roots in public procurement, where federal and state requirements place numerous strictures on bidding and contract terms.³⁰⁰ There is no reason why, for example, private parties may not use the initial partnering conference as the forum for discussion of contractual risk allocation or other contract obligations in light of the overriding needs of the relationship.³⁰¹

In a similar vein, more attention should be given to the value of including transactional counsel in the partnering conference. Although it is clear that partnering represents an attempt to restore principal parties to center stage in approaches to conflict and to limit the role of legal professionals, many lawyers are beginning to understand the importance of participating as members of the partnering team.³⁰² Indeed, it makes sense to include legal counsel in an in-depth discussion of project conflict management and performance goals—and better acquaint them with the personalities that will translate the written integration into flesh and blood.³⁰³

²⁹⁸ The logical connection between partnering and the development of a relational conflict management scheme has been largely overlooked. See IWR WORKING PAPER, *supra* note 59, at 94.

²⁹⁹ See ANDERSON, *supra* note 270, at 9 (commenting that partnering is not a substitute for the terms of the written contract).

³⁰⁰ See *id.* at 10.

³⁰¹ See Bickerman, *supra* note 270, at 61. The mechanisms for contract modification should be followed in making appropriate changes to legal rights and obligations.

³⁰² See Stipanowich, *Beyond Arbitration*, *supra* note 2, at 154–160 (showing recent data that indicates that a majority of construction attorneys favor training in partnering concepts, and expect their firm or organization to encourage its use); see also Bickerman, *supra* note 270, at 64 (arguing that attorneys may profitably play roles in partnering).

³⁰³ For insightful perspectives on the roles of lawyers in partnering, see Kunz, *supra* note 275. See also Claramargaret H. Groover & James P. Wagner, *Advocacy in*

C. Beyond Project Partnering

Even before the evolution of project partnering, a number of prominent institutional owners, contracting and design firms understood the benefits of facilitated group decision making and strategic initiatives which transcend individual projects or contracts.³⁰⁴ Partnering strategies are often perceived as a quicker, more flexible and less risky means of responding to market opportunities than vertical integration.³⁰⁵ The level of planning and commitment varies directly according to the scope and duration of the relationship;³⁰⁶ in some cases, the partnering agreement may itself approximate the contractual framework of a joint venture.³⁰⁷

The principle of facilitated collaborative problem solving has applications on all levels. The U.S. Army Corps of Engineers, long in the forefront of experimentation with facilitated conflict management, has "partnered" with major professional associations for the purpose of developing joint standards or guidelines for design or construction and for the development of constructive approaches to job site conflict. It has also engaged in consensus building initiatives with members of the public,

Partnering—Do Lawyers Have a Place at Partnering?, ABA Forum on the Construction Industry Annual Meeting, New Orleans, La., (Apr. 24, 1997) (on file with author).

At the conclusion of a partnering session which I facilitated, counsel for one of the primary participants informed me that his involvement in the process provided him with unique insights into the workings of the relationship for which he had negotiated a contract. He found the perspectives immensely valuable.

³⁰⁴ See PARTNERING EXCELLENCE, *supra* note 272, at 18–22; see also IWR WORKING PAPER, *supra* note 59, at 24–27, 41–70 (describing use of partnering by Corps with professional associations and other groups, and consensus-building among different groups of stakeholders).

³⁰⁵ See PARTNERING EXCELLENCE, *supra* note 272, at 18–22; see also Cook & Hancher, *supra* note 268, at 438; cf. Anderson & Narus, *supra* note 268 (describing partnering strategies by suppliers of goods and services).

³⁰⁶ See Cook & Hancher, *supra* note 268, at 438–440, 442–445 (discussing time and preparation required for effective strategic partnering, and guidelines for strategy development and implementation). Some early applications of partnering involved ongoing relationships and joint ventures on a series of individual construction projects. See also PARTNERING EXCELLENCE, *supra* note 272, at 29–35 (setting forth guidelines for selecting a partner).

³⁰⁷ See Cook & Hancher, *supra* note 268, at 439–440.

environmental groups, agencies and other groups concerned with or likely to be affected by anticipated Corps initiatives.³⁰⁸

Another result of the enculturation of partnering may be the evolution of dynamic conflict management systems which are closely intertwined with the relationships they govern and are personified by a relational conflict manager combining the roles of the partnering facilitator and post-conflict intervenor.³⁰⁹

VI. BEYOND THE MULTI-DOOR CONTRACT: A SYSTEMATIC, DYNAMIC APPROACH TO CONFLICT MANAGEMENT

A. *The Movement Toward Dynamic, Systemic Approaches*

In a few short years, conflict resolution in the construction industry has moved from a traditional, relatively static, arbitration-focused "system in crisis" to more variegated approaches placing deliberate early emphasis on interest-based bargaining and less costly, more dependable methods of injecting perspectives on rights and power issues into the discussion. At the same time, industry-based TQM approaches have inspired a mini-culture of "partnering," emphasizing the importance of articulated common goals, more effective communication and reinforced solidarity, reciprocity and trust—in essence, addressing the roots of conflict.

The industry is uniquely poised to bring together all of these elements to produce conflict management approaches that embody all of the attributes of the multi-door courthouse—a systematic treatment of conflict

³⁰⁸ See IWR WORKING PAPER, *supra* note 59, at 24–27, 41–70. In addition to assisting with a number of in-house initiatives for a large design/build firm (including, among other things, task forces addressing the respective roles and responsibilities of design professionals and construction personnel, site safety issues, scheduling concerns and information systems), I have facilitated cooperative efforts between a contractor and its major subcontractors and suppliers to address common problems associated with project completion, post-construction building operations and long-term purchasing strategies. Solutions include modifications to standard form contracts and corporate operating guidelines as well as informal structures for ensuring communications between contracting parties.

³⁰⁹ Thus far, the possibilities described in Part VI have not been widely grasped even in sectors where partnering has become a part of the culture. See IWR WORKING PAPER, *supra* note 59, at 30, 94 (describing widespread use of partnering in Corps of Engineers projects, and the failure to exploit possible links between partnering and the development of ADR processes).

that permits close tailoring of the process to the problem and responds dynamically to the changing circumstances of disputing parties. Realization of the vision of a multi-faceted facilitation of a complex commercial relationship throughout its lifespan is now well within reach, but has rarely been achieved in practice.

B. A Lesson from Hong Kong: The Dispute Resolution Adviser

A system put in place on a Hong Kong construction project in the waning days of 1991, a synthesis of all the foregoing elements, represented a quantum leap in the evolution of contractual dispute systems.³¹⁰ The contract for the renovation of Queen Mary Hospital, a venerable 56-year-old edifice, required intricate demolition and construction services to be performed while keeping the hospital and operating theatres operational—a complex and challenging scheme likely to prove a hotbed of conflict.³¹¹ The project owner, the Hong Kong Government's Architectural Services Department (ASD), desirous of strict budget control, required a system which would identify and resolve disputes in the shortest possible time and prior to completion of the project. ASD retained the services of an international team of consultants to develop an appropriate dispute resolution system for the project.³¹²

The consultants first spoke confidentially with project participants (including pre-qualified contractors) regarding the nature of the project, their objectives and concerns and potential areas of dispute.³¹³ The result was a report setting forth specific recommendations for project organization and administration aimed at avoiding or minimizing areas of dispute. These included tight time frames for jobsite decisionmaking and handling of claims, and the establishment of a flexible, dynamic dispute resolution system centered upon the figure of a Dispute Resolution Adviser (DRA).³¹⁴

The resulting agreement called for joint appointment of a neutral, a construction expert possessing dispute resolution skills as the DRA at the

³¹⁰ See Colin J. Wall, *The Dispute Resolution Adviser in the Construction Industry*, in FENN & GAMESON, *supra* note 65, at 328.

³¹¹ See *id.*

³¹² See *id.* at 328-29.

³¹³ See *id.* at 333-334.

³¹⁴ See *id.* at 334-335.

time the construction contract commenced.³¹⁵ A default mechanism was established for independent appointment of a DRA should the parties fail to agree on an appointee. The DRA's fees were to be shared equally between the owner and general contractor.³¹⁶

The DRA's first function was to meet with job participants to explain and build support for a cooperative approach to problem solving on the project. Among other things, the DRA was to discuss basic rules of communication and attitudinal changes necessary to avoid adversarial positions.³¹⁷ Thereafter, the DRA was to make monthly visits to the site for the purpose of consulting with project participants on the status of the job and facilitating discussions respecting any conflicts which arose since the last visit. The DRA was given considerable flexibility in managing such discussions.³¹⁸

In the event of a formal challenge to a project decision, certificate or evaluation, the parties were given four weeks to negotiate pertinent issues (with or without the assistance of the DRA).³¹⁹ In the event the problem remained unresolved, a party's written notice of dispute would trigger a more formal stage of dispute resolution in which the DRA had freedom to employ any of several methods of third-party-assisted dispute resolution including mediation, mini-trial and expert fact-finding. The proceeding would involve site level representatives and would be conducted with the assistance of the DRA or a qualified third party.³²⁰

If assisted site level negotiations failed, the DRA was to prepare a report identifying the key issues in dispute, the positions of the parties, and the perceived barriers to settlement and making either a recommendation for settlement or a nonbinding evaluation of the dispute. The report would be used by senior off-site representatives of the parties in further negotiations, perhaps assisted by the DRA.

Should matters not be resolved within fourteen days of the issuance of the DRA's report, the DRA would set into motion a short-form arbitration procedure or other mutually acceptable means recommended by the

³¹⁵ See *id.* at 335-336.

³¹⁶ See *id.* at 338.

³¹⁷ See *id.* at 334-35.

³¹⁸ See *id.* at 336.

³¹⁹ See *id.* at 336.

³²⁰ See *id.* at 336-337.

DRA.³²¹ The arbitrator would be appointed by the parties; failing their agreement, the DRA would make the selection.

The DRA procedure worked well. Despite the usual problems and several hundred owner-ordered changes, no disputes reached the stage of nonbinding evaluation.³²² The DRA system has since been applied on at least one other hospital project for the same owner.³²³

C. A Proposal: The Conflict Management System

The planners of St. Mary's Hospital and their able consultants came to recognize that in the relational sphere, conflict resolution is properly approached not as an event or set-piece intervention, but as a process inextricably intertwined with the relationships that evolve along with the physical design, procurement and construction of the building. Their solution embraces a number of the following elements which might be the hallmarks of a contractual conflict management system:

- (1) a comprehensive *program* which commences with the contractual relationship(s) and extends throughout the life of the relationship(s);
- (2) the *active involvement of key contract participants* in "partnering," in initial program design and, ultimately, in the resolution of conflict;
- (3) the establishment of a *variegated conflict resolution scheme* that incorporates a series or selection of strategies consistent with the parties' goals; and
- (4) an *independent adviser* who, either alone or as part of a larger team or organization, advises, models, teaches, facilitates and provides the human backbone for the entire program.

1. A Conflict Resolution Program

The recent success of partnering processes demonstrates that effective management of conflict in a relational system begins at the beginning of the relationship³²⁴ and contemplates a continuity of effort throughout its lifespan. Traditional ADR is a discrete event, a reactive, set-piece

³²¹ See *id.* at 337-338.

³²² See Colin J. Wall, *The Dispute Resolution Advisor: A New Approach to Preventing and Resolving Construction Disputes*, DART NEWS, Aug. 1993, at 1.

³²³ See *id.* at 2.

³²⁴ See *supra* Part V.

intervention by a third party who steps in to arbitrate, render an advisory evaluation or mediate a particular set of issues and then steps out. As a result, the intervention strategy may be brought into play too late in the game to take advantage of integrative solutions, the intervenor may lack an adequate or helpful perspective on the context of the conflict and the lessons of the intervention (such as the cooperative style modeled by a mediator) may vanish with the intervenor when the intervention ends.

Better, therefore, to address conflict management prospectively, to inculcate basic principles of collaborative problem solving and to make conflict resolution strategies part of a systematic and continuous plan. The key, of course, is the parties.

2. Active Involvement by Key Participants

Partnering facilitators and ADR systems designers collectively acknowledge that active involvement by key participants is a critical element in successful conflict management approaches.³²⁵ As partnering teaches, conflict may be avoided, muted or constructively channeled by initially educating primary participants regarding differing conflict styles, by modeling the principles of integrative bargaining, by identifying common goals as well as the personal ends of key personnel and by deliberate discourse on the "give-and-take" mechanics of performance. Such discussions may also address contractual risk allocation and other issues which sow the seeds of discontent and raise efficiency concerns, thus setting the stage for more successful teamwork during execution.

In addition to permitting the parties to design a conflict management scheme that is most appropriate to their specific needs, problem solving exercises and facilitated "concertation"³²⁶ help to ingrain in participants a model for subsequent interactions. Contracting partners are, in effect, given the tools to be effective team members. Application of these tools not only reduces the need for later third-party intervention, but also makes it more likely that low-end interventions (such as mediated negotiation) will bear fruit. Such empowerment in primary actors may also reduce the perceived need for legal counsel.

³²⁵ See *supra* Section V.A.2.

³²⁶ See C. A. Leads, *The French Approach to Handling Conflicts and Negotiating: Certain Notable Features*, in FENN & GAMESON, *supra* note 73, 151, 158-159.

3. *A Variegated, Flexible System*

Another lesson of effective conflict management is that systemic planning is a matter of evolution from the ground up. Such a principle stands in stark contrast to the boilerplate approaches so frequently adopted as part of a standard industry contract and imposed unreflectively on a relationship. As we have seen, serious dissatisfaction with traditional “cookie-cutter” approaches stimulated experimentation with new intervention strategies such as dispute review boards³²⁷ and mediation³²⁸ (and even led to new, more variegated boilerplate!³²⁹), as well as project partnering schemes.³³⁰

The St. Mary’s Hospital experience demonstrates the effectiveness of a deliberate front-end “conflict diagnosis” and system design with the participation of the parties. Partnering workshops offer an ideal platform for such discussions, which might be finalized by a “design committee” consisting of a facilitator and representatives of the major parties.³³¹

Judging from present trends, it is likely that the resulting system would be a stepped system placing initial emphasis on face-to-face negotiations as well as third-party intervention strategies, appropriately reinforcing the preeminent role of party self-determination and underlining the importance of interest-based bargaining. There might also be some form of a low-cost advisory mechanism to inform negotiations regarding “rights boundaries” and power issues, followed by a “loop-back” to negotiations.

Because it is sometimes vitally important to vindicate rights,³³² the system should also describe the method for final adjudication of disputes, if necessary; even here, however, it may be possible to make arrangements to take account of other ends or values, such as continued performance and preservation of relationships.

While the final product will be a template of conflict resolution strategies, some flexibility should be retained for the sake of addressing

³²⁷ See *supra* Section IV.B.

³²⁸ See *supra* Section IV.C.

³²⁹ See *supra* Section IV.D.

³³⁰ See *supra* Part V.

³³¹ See URY ET AL., *supra* note 14, at 69–70.

³³² See Macaulay, *Elegant Models*, *supra* note 77, at 512 (quoting Laura Nader, *Forums for Justice: A Cross-Cultural Perspective*, 31 J. OF SOC. ISSUES 151, 159 (1975)).

particular needs and changing circumstances. In this and other ways, the Conflict Manager plays a pivotal role.

4. *The Conflict Manager*

The backbone of a relational conflict management system is a neutral who performs a variety of facilitative roles during the course of a relationship. Because of this actor's ongoing identification with the transaction, she might be described as a "Friend of the Contract," or "Contract Helper;" or, in recognition of her plenary role with respect to conflict resolution, a "SuperNeutral." There is also the all-purpose (if more prosaic) sobriquet "Facilitator." On the St. Mary's Hospital project, the more straightforward designation of a "Dispute Resolution Adviser" was used. Preferred here, however, an identifier consistent with the active, hands-on role of the neutral: "Conflict Manager."

The Conflict Manager's (CM's) role would begin as early as possible in the contractual relationship, commencing with the facilitation of initial partnering workshops involving owner, design professionals, prime contractor(s) and key subcontractors. In this setting the CM would perform all of the usual roles of a partnering facilitator, including educating participants regarding conflict styles, modeling integrative bargaining approaches and assisting the parties in reaching a consensus on the goals and principles animating the relationship.³³³ Project participants would have an opportunity to establish a foundation of trust, solidarity and reciprocity by facilitated group discussion of a range of performance issues.

At this stage, moreover, the CM would assist representatives of key participant groups in conducting a "conflict diagnosis" for the job and advise the group regarding dispute processing alternatives. With the CM's assistance, the group would develop a specific conflict management system for the project.³³⁴

³³³ In this way, the process promotes on the transactional level the educational and disciplinary goals of contract law in society at large. *See generally* LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* 184 (1965). It also provides a framework for accommodating the dominant objective of rational actors in commercial relationships—to reduce the risk of contingencies over *which* a party has control, and to permit "adjust[ment] to future circumstances in order to maximize the expected value of their contract." Scott, *supra* note 78, at 615.

³³⁴ The role of facilitator might also involve a broader role in contracting issues. For example, the CM might play a part in realistic risk identification and allocation at the negotiation and drafting stage in the interest of maximizing efficiency and

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

The CM's role would continue during the performance of a construction contract. Like the DRA on the St. Mary's Hospital project, the CM might make monthly visits to the site to consult with key participants on the status of the job and mediate conflicts that arose since the prior visit.³³⁵ As mediator, the CM would help to define issues, encourage mutual understanding and assist the parties in exploring possible solutions.

Although the failure of mediated negotiation to achieve a satisfactory solution may activate the next stage of the management program, such as submission to early neutral evaluation or a dispute review board, the CM may still have an important role to play in paving the way for further process. The CM may, for example, help the parties identify the issues to be addressed, assist in structuring limited discovery to elicit relevant information and fine-tune ADR procedures. The most important assistance provided by the CM, however, may be in the selection of neutrals—both in helping to identify neutrals with the proper qualifications and in serving as a buffer between the parties and the neutrals with respect to appointment and payment matters.³³⁶ Although here the CM's role would remain essentially facilitative, it would be possible for the parties to authorize the CM to break procedural impasses by making process-related decisions.³³⁷

minimizing unproductive conflict later in the job, or identify overlaps or gaps in the contract documents. The CM may be responsible for making certain that lines of communication are established between and within organizations and disciplines, and may even facilitate the choice of an appropriate contract and procurement strategy for the job.

Such efforts, however, may increase the possibility that the facilitator's own efforts become the focus of disputes, and the facilitator a *de facto* party. Such concerns may augur in favor of limiting the scope of the facilitative role.

³³⁵ See *supra* text accompanying note 316; see Wall, *supra* note 310, at 336.

³³⁶ A major source of difficulty with respect to so-called "party-arbitrators"—arbitrators appointed by and paid by a single party—is that it is well-nigh impossible to avoid entirely predispositions on the part of the arbitrator, who is aware of the source of the appointment and payment. See III MACNEIL ET AL., *supra* note 155, § 28.4. If the parties desire to have a tripartite panel in which they have a unilateral voice in selecting one of the arbitrators, but truly desire neutral arbitrators, it would be advisable to have a third party—in this case, the CM—make contact with the prospective arbitrators and arrange for payment without informing them of the source of their appointment. I have performed this function as a neutral facilitator.

³³⁷ In relational contracting, a perceived advantage of binding arbitration is that it provides a mechanism for addressing contingencies not covered by the agreement. After the fact, the arbitrator could step in to resolve the case in a manner consistent with the

A final facet of the CM's ongoing role is evaluative. From time to time during the course of performance and at its conclusion, the CM would elicit feedback from project participants and assess the workings of the conflict management system. The CM's findings may result in major modifications or slight adjustments to the program. Ultimately, lessons learned on the job would factor into future programming for conflict.

D. Some Questions Raised by the Proposal

1. Cost Concerns

Obviously, the transaction costs associated with any form of third-party intervention must be carefully considered.³³⁸ The recent experience of California with judicially appointed private discovery referees illustrates the potential costs of extensive private management of the process.³³⁹ In that context, there are complaints that the enormous cost of private referees gives great leverage to those who can afford to bear the additional costs of management.

Given the high cost of disputing in construction contracting, a proactive approach to conflict requiring a front-end investment of time and dollars is probably justified on most large projects. The additional cost associated with ongoing third-party facilitation is also likely to be relatively small in light of time and dollars saved by avoiding extended dispute resolution processes, especially if such facilitation is limited to those situations when the parties (who are themselves trained in collaborative problem solving) truly need the services of an intervenor.³⁴⁰ The experience of various organizations with project partnering support these conclusions.³⁴¹

intent of the parties and pertinent commercial or relational norms. Likewise, arbitrators have broad authority with respect to procedural matters. *See id.* § 32.1.2.

If deemed appropriate, the parties might apply the same principle to the resolution of procedural issues arising under the conflict management system. That is, failing a facilitated understanding on particular issues, the parties might leave it to the CM to arbitrate the matter. Whether it would be necessary to comply with the typical formalities of binding arbitration, including a formal award, is another matter.

³³⁸ *See* Macaulay, *Elegant Models*, *supra* note 77, at 508.

³³⁹ *See* Reuben, *supra* note 69, at 57-58.

³⁴⁰ The issue of who pays the cost is addressed *infra*.

³⁴¹ *See* IWR WORKING PAPER, *supra* note 59, at 31 (noting that cost data from Corps of Engineers projects demonstrates potential cost-effectiveness of partnering on large projects), 86-90 (noting that limited cost data from Corps of Engineers suggests

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

The viability of conflict management systems on small projects is a closer question. Parties to minor, short-term relationships may not find it cost-beneficial to devote significant time and energy to partnering exercises and programming for conflict at the outset. It may be necessary, therefore, to adopt or adapt programs developed by industry organizations, by counsel for the transaction or by in-house templates. Even here, however, the principles of programmed conflict management may be effectively applied, and disputes involving relatively small amounts of money can be efficiently and effectively resolved utilizing stepped approaches and creative facilitation addressing process issues such as document exchange.³⁴² Private practitioners, like creative judges, are increasingly learning that in addition to traditional mediation, neutral facilitators may play an important role in managing the exchange of information and setting the stage for conflict resolution.³⁴³

2. Enforceability of the Conflict Management Program

Various practitioners have been curious as to the enforceability of various aspects of the conflict management program. More sophisticated attorneys would make a point of comparison with the statutory framework

cost-effectiveness, tangible benefits of various ADR processes), 34–35 (noting that partnering may be effectively employed in “abbreviated form” on smaller projects), 15 (reporting that when “when conflicts . . . occur [on a Corps of Engineers project], a well-established orientation towards joint problem-solving often enables staff to resolve them before they escalate”).

³⁴² See Gerald B. Kirksey & Lawrence M. Watson, Jr., *How to Resolve a \$100,000 Construction Claim . . . for Something Less than \$100,000 (in fees and costs)*, 1997 ABA Forum on the Construction Industry Annual Meeting, New Orleans, La., April 24, 1997.

³⁴³ See *id.*; see also Ronald H. Kahn, A Mediation Protocol for the Complex Case, Presentation to Division 1, ABA Forum on the Construction Industry Annual Meeting, New Orleans, La. (on file with author).

Where parties have an ongoing relationship involving a series of relatively small contracts, the transaction costs associated with more extensive front-end procedures may be more easily justified. Some early applications of partnering involve ongoing relationships and joint ventures on a series of individual construction projects. See PARTNERING EXCELLENCE, *supra* note 272, at 21–28 (discussing partnering opportunities for small businesses and projects).

that exists for the specific enforcement and facilitation of agreements to arbitrate and resulting awards.³⁴⁴

Clearly, the arbitral component of any dispute management agreement would be as enforceable as any executory agreement or submission to arbitration. The enforceability of other aspects of the program are less certain, although a growing number of decisions have specifically enforced agreements to mediate and other processes involving third-party intervention.³⁴⁵

If the system is to work, however, it should not depend heavily upon coercion. Rather, the parties should see a mutual benefit in adherence to the tenets set forth in the conflict management agreement and, when necessary, accept the process determination of the CM as a matter of respect for the system and the individual filling that role.

3. *Qualifications and Standards for CMs*

Inevitably, the tidal wave of reform promoting officially sanctioned ADR has been followed by a chorus of calls for standards for the selection and training of neutrals and for ethical standards governing their performance.³⁴⁶ The advent of the CM, whose facilitative role transcends the discrete dispute and involves substantial input into the very program under which he operates, is likely to reinvigorate debates regarding professional qualifications and standards.

a. *Filling the role of CM*

Candidates for the role of CM will come from varied professional backgrounds. In the construction arena, early prospects will include attorneys and expert consultants.

With each passing month, more legal professionals are identifying ADR roles as a part of their professional practice. The quiet revolution in court-connected conflict resolution has created regional markets for mediators of varying expertise, and a small but growing cadre of construction lawyers are marketing their services in nonadvocacy roles (usually as mediators).

³⁴⁴ See generally III MACNEIL ET AL., *supra* note 155.

³⁴⁵ See *supra* note 266.

³⁴⁶ See Wade Lambert, *Calls Increase For Guidelines On Mediation*, WALL ST. J., Oct. 22, 1993, at B1.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

The integration of neutral roles into traditional law practice brings with it new issues relating to conflict of interest and other ethical dilemmas,³⁴⁷ but is nevertheless a welcome development for many attorneys whose talent and temperament favor collaborative problem solving. Based on evidence to date, their perspectives and their approaches to conflict management programming are likely to be heavily influenced by their professional preoccupation with legal issues and their experience in legal processes.³⁴⁸

Multi-disciplinary consulting firms, long a fixture in construction claims practice, are anxious to retool to stay abreast of developments in the conflict resolution market. Such organizations are, along with a host of new entrants to this easy-entry field, advertising partnering consultation and more extensive facilitative services.³⁴⁹ As products of the construction industry, their emphasis is likely to be much less legalistic than their attorney counterparts, and they may downplay or even discourage attorney participation in conflict management.

³⁴⁷ This has prompted the development of guidelines for attorneys acting as neutrals. *See infra* note 353.

³⁴⁸ *See supra* Sections III.A, III.B., IV.B., IV.C. The most extreme proposal for lawyer involvement in conflict management was advanced by Boston attorney Christopher Noble. *See generally* Christopher L. Noble, Project Counsel: An Alternative Paradigm for Construction Law Services, 1996 Construction Industry Superconference (Dec. 13, 1996) (on file with author). Noble's "project counsel" would, among other things, work with the owner and others to help identify "goals, objectives, financial resources, management and technical capabilities," help select the proper project delivery system, advise on and facilitate the selection of other project participants, draft key contracts, facilitate the team-building (partnering) process, select dispute resolution processes, address risk management issues, assist in project closeout and function as a resource in the resolution of post-construction disputes. *See id.* at 5.

The concept has much in common with the Conflict Manager concept, but goes much further in the direction of melding the concept of neutral facilitator with that of project attorney. In light of professional ethical concerns, lawyers are probably better advised to opt for the neutral's cap or the advocate's cap, but not both at once. On the other hand, there is much of value in the Project Counsel concept; of particular significance is its recognition that attorneys should be part of the project team and should, if possible, be involved from the outset in conflict management efforts.

³⁴⁹ *See generally* Ozzie Bermant, *A Proactive Approach to Organizational Conflict*, in *RESOLVING CONFLICT: STRATEGIES FOR LOCAL GOVERNMENT* (Margaret S. Hermann ed., 1994); Irvin Richter, The Project Neutral: Returning Control of Disputes to the Parties, 8th Annual Construction Superconference (April 21, 1994) (on file with author) (describing Hill International's ADR offering).

Because the CM should generally be limited to a facilitative role in designing and carrying forward the conflict management program,³⁵⁰ the assistance of other individuals will be needed if the program calls for early neutral evaluation, a dispute review board or binding arbitration. Clearly, having access to a pool of prospective neutrals with appropriate credentials will be an important marketing tool for the CM, suggesting a new opportunity for well-organized providers who command such human resources on a regional or national basis, such as an American Arbitration Association or a JAMS/Endispute. Again, however, the conflict management system turns traditional "administered ADR" on its head: instead of a reactive, post-conflict intervention in which the disputing parties are initially assisted by a low-level ministerial staffer, the CM approach addresses conflict proactively with the assistance of a sophisticated facilitator who stage-manages a range of intervention strategies.³⁵¹ Such individuals will require relatively wide experience in conflict resolution, broad training, which encompasses the spectrum of facilitation and ADR specialties, and exceptional personal and administrative skills.

There is as yet no single national organization that provides construction neutrals—arbitrators, mediators, evaluators and facilitators—of proven quality and which offers the full range of auxiliary services necessary to facilitate the full spectrum of construction-related disputes, including conflict management system services of the kind just described. The AAA continues to make significant strides in this direction, but is, frankly, encumbered by the very size and scope of its operation. The ideal would be a close-to-the-ground operation, based regionally, that provides a roster of sophisticated and well-trained professionals from all construction-related disciplines. The group should be organized into multi-disciplinary teams with credentials ranging from facilitation of group decisionmaking, including project partnering, to system design, mediation and nonbinding evaluation and binding arbitration. Such an approach can probably be cost-

³⁵⁰ See *supra* Section VI.C.4.

³⁵¹ Of course, to make the CM process more cost-effective, it is likely that many of the functions performed with the assistance of the CM, such as contacting prospective neutrals or setting up sessions, could be performed by staffers working under the guidance of the CM.

effective, but must somehow address the immediate hurdle of acceptance by a critical mass of users.³⁵²

4. *Ethical Issues*

Confidence in the conflict management process requires that the CM and other participating third-party intervenors are perceived as performing their functions impartially and with integrity.³⁵³ To the extent that the CM plays a part not only in facilitating negotiations regarding substantive project issues but also performs a central role in program design and neutral selection, her function is both extremely sensitive and difficult to classify in traditional terms.

The sensitivity of the CM's ongoing role demands care in selection and payment arrangements. Practically speaking, an owner may find it necessary to arrange for the involvement of a particular CM even before a construction contractor and other parties have been engaged. Nevertheless, the contractor and other primary stakeholders should have an opportunity to accept or reject the CM after being informed of potential conflicts of interest and should be given the option of paying a portion of the CM's fee.

Another issue relating to remuneration involves the reasonableness of the CM's expenditures. Because of the broad discretion enjoyed by the CM from the inception, the CM bears a special responsibility to avoid unnecessary expenses in the management of the program.

Moreover, the CM must exercise care in assuming rules for which she is unsuited. There may be circumstances in that issues arise which demand expertise beyond that of the CM³⁵⁴ and even require the empanelling of multiple neutrals.

The CM should also avoid situations which imperil the central facilitative role. Circumstances will undoubtedly arise in which a CM is asked to render a nonbinding recommendation or make a binding arbitral

³⁵² A major advantage enjoyed by the AAA and a corresponding hurdle for all would-be providers is the AAA's incorporation in dispute resolution provisions of major industry contract prototypes.

³⁵³ See, e.g., JOINT COMMITTEE ON STANDARDS OF CONDUCT, STANDARDS OF CONDUCT FOR MEDIATORS (1994), Art. II; CENTER FOR DISPUTE SETTLEMENT, INSTITUTE OF JUDICIAL ADMIN., STANDARDS FOR COURT-CONNECTED PROGRAMS § 8.1.a; cf. generally III MACNEIL ET AL., *supra* note 155, at ch. 28 (discussing legal and ethical rules mandating arbitrator impartiality).

³⁵⁴ See *supra* note 69 and accompanying text.

award regarding one or more substantive issues in dispute. Although there is no absolute legal, practical or ethical bar to the CM playing either of these roles, at a minimum the parties should be informed regarding the difficulties associated with a mixed role.³⁵⁵ Even when both parties have asked the CM to assume an evaluative role, however, the potential harm to the facilitative role may augur against such action.

Setting aside other concerns associated with mixing the roles of mediator and adjudicator, the rendition of an arbitration award (and even a nonbinding evaluation) may have a significant effect on the relationship of the CM with the parties. Traditionally, commercial arbitrators are appointed to resolve a single set of issues between parties. Once arbitrators have heard evidence and rendered a final award addressing the issue(s), they are *functus officio*: their official powers and duties and their relationship with the dispute are at an end.³⁵⁶ So, too, ends their affiliation with the parties, unless the parties have agreed otherwise. This approach insulates arbitrators from post-award approaches or attacks by the parties and safeguards the finality of awards. Although dissatisfaction with the decision may cause at least one party to find fault with the decisionmaker, that consequence is trivial if the parties cease the relationship of judge and supplicant and the decisionmaker has passed from the scene. The dynamic is different where the arbitrator retains authority to facilitate other matters after an award is rendered. Unhappiness with the last award may well diminish a party's respect for the neutral and the process, and make it less likely that the parties will fully cooperate in subsequent informal processes. As previously noted, the successful execution of the CM function demands that the neutral enjoy the trust and cooperation of all parties; when these are compromised, the CM cannot operate effectively.

The best solution may be for the CM to avoid the role of adjudicator in favor of the more limited role of "evaluation/arbitration facilitator." This function would include advising the parties respecting the choice of evaluators or arbitrators, discussing procedural options (such as the choice of location and the desirability of an opinion accompanying the award) and, where necessary, serving as arbiter of these process issues.

³⁵⁵ See Lou Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 23-30; Joseph Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359, 367 (1975); *Exploring Alternatives to the Strike*, MONTHLY LAB. REV., Sept. 1973, at 33.

³⁵⁶ See III MACNEIL ET AL., *supra* note 155, § 37.6.1.1.

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

Ultimately, the uniquely broad role of the CM will probably demand the development of special standards of conduct. At a time when increasing emphasis is being placed not only on ethical standards for individual neutrals³⁵⁷ but also on the ethical obligations of agencies administering or sponsoring ADR services,³⁵⁸ those considering ethical standards for CMs may find it appropriate to draw upon both strands of development.

In addition, consideration should be given to an effective institutional framework for education, self-policing and quality assurance. One possibility might be a National Academy of Commercial Neutrals—a select group of individuals from the United States and abroad with established credentials relating to various ADR functions, including a CM group. The National Academy would publish standards for practice and opinions dealing with discrete ethical issues, and maintain and provide pertinent information on its membership and police infractions of standards by its members.

E. Socialization

Assuming the conflict management program gains currency in one or more relational settings, one must expect that it would have a profound effect upon relationships. The principles and values underlying the facilitative structure will, to one degree or another, be inculcated in primary actors within the affected system.³⁵⁹

Companies and institutions which deal frequently with conflict are becoming increasingly sophisticated regarding dispute resolution alternatives. As they become more and more familiar with the features and appropriate uses of partnering, mediation, third-party evaluation and other approaches, they may perceive less and less necessity for strategic

³⁵⁷ See, e.g., Proposed Model Rule (of Professional Conduct) for The Neutral Lawyer (Reported by Carrie Menkel-Meadow, Chair, CPR-Georgetown Commission on Ethics and Standards in ADR), Oct. 2, 1997 revision (on file with author).

³⁵⁸ See, e.g., Glenn Koch, *AAA Adopts Ethics Code*, DISP. RESOL. TIMES, Fall 1997, at 1 (discussing new AAA Code of Ethics for Employees); Elizabeth Plapinger, Best Practice Standards for ADR Provider Organizations: A First Try, Oct. 3, 1997 Draft (on file with author).

³⁵⁹ Hume long ago spoke of a learned “sentiment of morality in the performance of promises”; that is, that actors may be socialized to appreciate the practical significance of living up to their word. David Hume, *A Treatise of Human Nature*, Vol. II, Book V, in MORRIS, *supra* note 113, at 206–207.

intervention by a CM. In the construction arena, project managers and others who must establish and manage relationship networks for projects may also become adept at structuring their own disputing systems. Large companies are likely to adapt ADR policies as a result of total quality management programs.³⁶⁰ In particular, insurers may offer guidance in and incentives for the use of such approaches.

Looking ahead ten years, leading construction lawyers foresee continuing changes in the realm of conflict resolution as well as other challenges to traditional practice models.³⁶¹ Early indications are, however, that the construction bar is rapidly embracing the new language of dispute

³⁶⁰ See generally Kimberly McCandless, *Establishing a Total Quality Approach to Alternative Dispute Resolution for Insurers*, 41 DRAKE L. REV. 711 (1992) (proposing that insurers employ TQM principles in dispute resolution programs).

³⁶¹ See Stipanowich, *Facilitator's Report*, *supra* note 102. As chair of the Forum on the Construction Industry, Atlanta attorney John Hinchey recently described the construction bar as a "profession in search of itself." John W. Hinchey, *A Profession in Search of Itself*, CONSTRUCTION FORUM NEWS (ABA Forum on the Construction Industry, Chicago, Ill.), Apr. 1997, at 1, 2.

An even greater challenge to practitioners is economic. As a revolution in project delivery systems has required contractors and design professionals to repackage and to bundle their services, and in some cases to assume a major portion of the financial risk of construction and operation, lateral-thinking clients have naturally wondered why the same should not be asked of their legal advisors. The day of the blank check for legal services, as for all professional services, is waning; in the new day, "zealous advocacy at all costs" will be supplanted by a more careful weighing of costs and benefits. "Total war" strategy will often give way to more measured approaches to conflict resolution and more emphasis on planning and prevention of debilitating conflict. In the new era, moreover, a growing number of nonlawyers claim to offer better, more economical alternatives to managing construction industry business relationships. See Noble, *supra* note 348, at 5. A number of law firms are negotiating with major corporate clients regarding the formation of strategic alliances under which the parties negotiate a lump sum fee for all legal services during a specified period. See Interview with John W. Hinchey, Immediate Past Chair, ABA Forum on the Construction Industry, in Banff, Alberta (June 21, 1997); see also Marcia Coyle, *Feds Clear Flat-Fee Scheme for Building Industry; Firms Offer Low Rates and Incentive Not to Go to Court*, NAT'L L.J., Feb. 3, 1997, at A7 (noting that the antitrust division of the Department of Justice cleared a "flat fee dispute avoidance plan," under which participating law firms would guarantee to represent clients from all stages of a construction project—from contract planning through performance—for a flat fee which would be fully refundable if a client elected to litigate or arbitrate to resolve a project-related dispute).

THE MULTI-DOOR CONTRACT AND OTHER POSSIBILITIES

resolution, if not its spirit.³⁶² With customary resiliency, attorneys are seeking to claim the new tools—mediation, early neutral evaluation, dispute review boards and even partnering—as their own. In recent years, attorneys familiar with arbitration have often forsaken administered arbitration in favor of handling administrative details on their own³⁶³ and, for better or worse, have also made their mark on mediation.³⁶⁴ Ultimately, they may claim much of the advisory and facilitative role of the CM. The question is not so much whether these processes will render attorneys obsolete, but rather how “colonization” by bench and bar will affect conflict management programs.³⁶⁵

VII. CONCLUSION

In the two decades since the unveiling of the multi-door courthouse concept, there has been considerable progress in the direction of conflict resolution systems that brings to bear multiple intervention strategies with the aim of tailoring the process to the problem and responding to the changing dynamics of conflict. For a variety of political, perceptual and practical reasons, however, experimentation in the court system has rarely followed the precise lines of the original pluralist vision. The most significant developments include variations upon the single broad theme of mediation and the employment of magistrate judges and other neutrals as ADR specialists who advise, facilitate and direct pretrial conflict resolution.

As one might expect, the private sphere offers an even more fertile ground for the evolution of conflict resolution systems tailored to the needs of disputants and responsive to the dynamics of conflict. Particularly

³⁶² A recent survey sponsored by entities of the American Bar Association reflected that nearly 60% of responding construction attorneys desired training in “partnering” approaches. See Stipanowich, *Beyond Arbitration*, supra note 2, at 157.

³⁶³ See supra Section III.C.

³⁶⁴ See supra Section IV.C.

³⁶⁵ “Colonization” is an apt description for the series of developments by which attorneys transform a process utilizing the tools they know best, usually those derived from their experience with litigation in an adversary system. As we have seen, lawyers altered the nature of many forms of commercial arbitration by importing into the process many of the features of traditional litigation: prehearing motion practice (addressing issues of enforceability or scope of the agreement to arbitrate), discovery, objections regarding the handling of evidence and extenuated appeal processes. Attorneys identified their own brethren as a chief source of delay to the process. See Stipanowich, *Rethinking Arbitration*, supra note 73, at 461.

amenable to systematic approaches are long-term contractual relationships, such as contracts for building design and construction, which hinge upon relational values such as solidarity, reciprocity and trust.

In the construction arena, evolution has been moderated and shaped by the industry's traditional conflict resolution approaches including early evaluation by design professionals and binding arbitration, by the limitations of predispute contract drafting and by differing perspectives among primary actors. Nevertheless, recent years have witnessed an inexorable progression in the direction of dispute review boards and other evaluation approaches, mediation and other informal, relatively low-cost intervention strategies aimed at facilitating settlement. Further upstream, the industry has focused attention on the root causes of conflict and, through partnering programs, has reinforced relational values from the beginning of the relationship.

Although few have recognized the opportunities, all of the pieces are in place for the development of comprehensive conflict management systems, coterminous with the contractual relationship, which involve active participation and commitment by key parties from the outset, the establishment of a variegated conflict resolution scheme incorporating strategies consistent with relational goals, and the "human backbone" of the plan, the Conflict Manager, who inculcates key values, models collaborate problem solving approaches, advises on conflict resolution strategies and facilitates their implementation. Such systems, which hold obvious promise for major construction contracts, may also be applied in other kinds of contractual relationships, including partnerships and joint ventures. Hopefully, the principles of proactive, deliberate conflict management will permeate contract planning approaches in these and other venues.